DOCKET

No. 83-1427-CFH
Status: GRANTED

Title: Louie L. Wainwright, Secretary, Florida Department of Corrections, Petitioner
v.
Johnny Paul Witt

Docketed:
February 28, 1984

Court: United States Court of Appeals for the Eleventh Circuit

Counsel for petitioner: Landry, Robert J.

Counsel for respondent: McLain, William C.

Entry	Date	Note	Proceedings and Orders
1	Feb 28 1984	G	Petition for writ of certiorari filed.
2	Mar 26 1984		Brief of respondent Johnny Paul Witt in opposition filed.
3	Mar 26 1984	G	Motion of respondent for leave to proceed in forma pauperis filed.
4	Mar 27 1984		Supplemental brief of petitioner Wainwright, Sec., FL DOC filed.
5	Mar 28 1984		DISTRIBUTED. April 13, 1984
7	Apr 23 1984		REDISTRIBUTED. April 27, 1984
8	Apr 30 1984		Motion of respondent for leave to proceed in forma pauperis GRANTED.
9	Apr 30 1984		Petition GRANTED.
10	Jun 12 1984		Joint appendix filed.
11	Jun 12 1984		Brief of petitioner Wainwright, Sec., FL DOC filed.
12	Jun 15 1984	G	Motion of Texas District and County Attorneys Association for leave to file a brief as amicus curiae filed.
13	Jun 15 1984		Amicus brief of Texas District and County Attorneys Association joined by State of Alabama, et al.
14	Jun 25 1984		Motion of Texas District and County Attorneys Association for leave to file a brief as amicus curiae GRANTED.
15	Jun 25 1984		Record filed.
16	Jun 25 1984		Certified original record & C.A. proceedings, 3 volumes received.
17	Jun 26 1984		1 box of exhibits received.
18	Jul 12 1984		Brief of respondent Johnny Paul Witt filed.
19	Aug 8 1984		CIRCULATED.
20	Aug 10 1984		SET FOR ARGUMENT. Tuesday, October 2, 1984. (2nd case)
21	Sep 10 1984	D	Motion of petitioner to strike portions of respondent's brief filed.
22	Sep 17 1984		DISTRIBUTED. Sept. 24, 1984. (Motion of petitioner to strike portions of respondent's brief).
23	Sep 17 1984	X	Reply brief of petitioner Wainwright, Sec., FL DOC filed.
24	Oct 1 1984		Motion of petitioner to strike portions of respondent's brief DENIED.
25	Oct 2 1984		ARGUED.

PETITION FOR WRIT OF CERTIORARI

83-1427

Case No.

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1983

LOUIE L. WAINWRIGHT, Secretary,
Department of Corrections,
State of Florida,

Petitioner,

v.

JOHNNY PAUL WITT,

Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT
AND APPENDIX

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QUESTIONS PRESENTED

I. Whether the lower court erred in failing to apply the presumption of correctness required by 28 U.S.C. §2254(d) to the state court's factual finding that prospective juror Colby clearly expressed her inability to decide respondent's guilt or innocence because of her capital punishment views?

II. Whether the lower court erred in overturning the District Court's juror excusal ruling when it was not clearly erroneous, thereby violating Rule 52(a), Federal Rules of Civil Procedure?

III. Whether the lower court erroneously applied Witherspoon v. Illinois, 391 U.S. 510 (1968) and Adams v. Texas, 448 U.S. 38 (1980) yielding inconsistent results with other decisions and requiring the exercise of this Court's supervisory review?

IV. Whether, consistently with Witherspoon v. Illinois, 391 U.S. 510 (1968) and its progeny, a trial judge may excuse a prospective juror who fails to provide assurance that she can perform her duties as a juror in impartially deciding the accused's guilt or innocence.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

OPINIONS BELOW

The opinion of the Court of Appeals, Eleventh Circuit, is reported as 714 F.2d 1069 (11th Cir. 1983) and appears in the Appendix as A. 1-73. That court's order entered on January 4, 1984 denying the Petition for Rehearing and Petition for Rehearing En Banc is not yet reported and appears in the Appendix as A. 74-77. Two relevant opinions of the Supreme Court of Florida are reported as Witt v. State, 342 So.2d 497 (Fla. 1977) and Witt v. State, 387 So.2d 922 (Fla. 1980).

JURISDICTIONAL STATEMENT

The judgment of the Eleventh Circuit Court of Appeals was entered on September 16, 1983. A Petition for Rehearing and Suggestion for Rehearing En Banc was timely filed and denied on January 4,

1984.

This Court's jurisdiction is invoked pursuant to 28 U.S.C. §1234(1)

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Sixth Amendment to the United States Constitution provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defence.

The Fourteenth Amendment to the United States Constitution provides, in pertinent part:

> SECTION 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State

> shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

Respondent, Johnny Paul Witt and an accomplice, Gary Tillman, killed eleven year old Jonathan Kushner in October of 1973. The victim, who had ridden by on his bicycle at a spot where Witt and Tillman lay in wait, was struck on the head with a star bit, gagged and transported in a car trunk to a secluded area. Discovering that the boy was dead from suffocation, they committed sexual acts upon and mutilated the body. Witt was arrested and confessed to participation in the Kushner murder. Witt was convicted of first degree murder and sentenced to death and the Florida Supreme Court affirmed the judgment and sentence. Witt v. State, 342 So.2d 497 (Fla. 1977). This Court denied his certiorari petition. Witt v. Florida, 434 U.S. 935 (1977). Respondent moved to set aside the judg-

ment which motion was denied by the trial court. The Florida Supreme Court affirmed that ruling. Witt v. State, 387 So.2d 922 (Fla. 1980) and this Court again denied certiorari review. Witt v. Florida, 449 U.S. 1067 (1980). Witt sought federal habeas corpus relief and United States District Judge Carr denied the petition (A. 78-118). The district court agreed with the Florida Supreme Court and paid deference to its factual finding that juror Colby was properly excluded under Witherspoon v. Illinois, 391 U.S. 510 (1968) because her answers demonstrated she could not impartially decide Witt's guilt or innocence (A. 113-114).

Witt appealed the denial of habeas corpus relief and the Eleventh Circuit Court of Appeal reversed. Witt v. Wainwright, 714 F.2d 1069 (11th Cir.

1983) (A. 1-73). Petitioner Wainwright's rehearing petition and suggestion for rehearing en banc were denied January 4, 1984 (A. 74-77).

The lower court rejected all of Witt's claims for habeas corpus relief except the Witherspoon claim. The court limited its consideration to the dismissal of one juror, Ms. Colby, noting in footnote 9 that consideration of responses of jurors Cohn and Miller who were less ambiguous was unnecessary. 714 F.2d at 1081 (A. 57-61). The voir dire leading to juror Colby's dismissal included the following:

> "Mr. Plowman [for the State]: Now, let me ask you a question, ma'am. Do you have any religious beliefs or personal beliefs against the death penalty?
>
> Ms. Colby: I am afraid personally but not --
>
> Mr. Plowman: Speak up, please.

> Ms. Colby: I am afraid of being a little personal, but definitely not religious.
>
> Mr. Plowman: Now, would that interfere with you sitting as a juror in this case?
>
> Ms. Colby: I am afraid it would.
>
> Mr. Plowman: You are afraid it would?
>
> Ms. Colby: Yes, sir.
>
> Mr. Plowman: Would it interfere with judging the guilt or innocence of the defendant in this case?
>
> Ms. Colby: I think so.
>
> Mr. Plowman: You think it would?
>
> Ms. Colby: I think it would.
>
> Mr. Plowman: Your Honor, I would move for cause at this point.
>
> THE COURT: All right. Step down."
>
> (714 F.2d at 1081-82; A. 58-62)

Trial counsel neither objected to the excusal of Mrs. Colby, nor did he attempt

to seek to qualify her by further examination of her capital punishment views, although he did object to the excusal of another juror (A. 109, n. 10).

The lower court, disagreeing with both the Florida Supreme Court and the United States District Judge, held that excusal of juror Colby was improper under Witherspoon v. Illinois, 391 U.S. 510 (1968); in the court's view, that juror did not adequately express her unwillingness to impartially decide respondent's guilt or innocence.

REASONS FOR GRANTING THE WRIT

The instant case presents this Court with an opportunity to decide whether this Court's recent pronouncements in several cases that federal courts are required by 28 U.S.C. §2254(d) to pay deference to state court factual findings also apply to such findings which involve Witherspoon v. Illinois, 391 U.S. 510 problems. Petitioner submits that such deference is required and that the lower court erred by merely substituting its judgment for that of the state court.

In Wainwright v. Goode, ___U.S. ___, 78 L.Ed.2d 187 (1983), this Court summarily reversed the Eleventh Circuit Court of Appeals which had second-guessed the state court judgment that the trial court had not relied on predictions of future dangerousness as an aggravating factor:

"The seven justices of the Supreme Court of Florida concluded from their review of the sentencing proceeding that the trial judge had not relied upon the impermissible factor. On federal habeas review, the District Court likewise concluded that the sentencing judge did not rely on future dangerousness, emphasizing that its review of the record led it to the "same, independent conclusion" as that reached by the Florida court. Consequently, eight judges have concluded from their review of the record that the trial court did not rely on predictions of future dangerousness. A three-member panel of the Court of Appeals for the Eleventh Circuit, on the other hand, concluded that the state court's finding was not fairly supported by the record.

[4] At best, the record is ambiguous. The trial judge might have been describing his consideration of Goode's future dangerousness in the weighing process, or he might have been merely explaining, after having imposed the death sentence in accordance with state standards and without regard to future dangerousness, why he thought

that application of the state standards to Goode yielded an intuitively correct result. Because both of these conclusions find fair support in the record, we believe the Court of Appeals erred in substituting its view of the facts for that of the Florida Supreme Court."

(78 L.Ed.2d at 193)

In Marshall v. Lonberger, ___U.S. ___, 74 L.Ed.2d 646 (1983), the Court reversed a federal appellate court which had ruled that a defendant's guilty plea was involuntary, contrary to a state court holding. The Court opined that the high measure of deference alluded to in Sumner v. Mata, 449 U.S. 539,

". . . requires that a federal habeas court more than simply disagree with the state court before rejecting its factual determinations. Instead, it must conclude that the state court's findings lacked even 'fair support' in the record."

(___U.S. at ____; 74 L.Ed.2d at 657)

In Maggio v. Fulford, ____U.S.____, 76 L.Ed.2d 794 (1983), the Court summarily reversed the Fifth Circuit Court of Appeal for its mere disagreement with the Louisiana Supreme Court Justices and the federal district judge in regard to evaluating the evidence at trial of the defendant's competence.

Two judges on the lower court panel (Tuttle and Kravitch) have rejected the unanimous judgment of seven Florida Supreme Court Justices [1] and United States District Judge Carr [2] that juror Colby adequately expressed her inability to impartially decide Witt's guilt or innocence, without explanation of the reason for such rejection; this mere

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1/ Witt v. State, 342 So.2d 497 (Fla. 1977).

2/ (A. 113-114)

disagreement violated the precepts of Coode, supra, Marshall, supra, and Fulford, supra. The third judge (Roney) recognized that the majority's soundness of the analysis was questionable (A. 72) and would have granted rehearing in light of the recent en banc decision in McCorquodale v. Balkcom, ____F.2d____ (11th Cir. Case No. 82-8011, December 30, 1983) (A. 77).

Acceptance of the instant petition and resolution of the presented questions would aid not only the particular litigants herein, but also all the state and federal courts. The first two questions are of particular interest to the lower federal courts. A federal district judge should not be left in limbo, to guess whether his appellate brethren will laud or chastise him for presuming the state court findings to be correct

pursuant to 28 U.S.C. §2254(d). 3/ And a federal district judge should also be alerted whether or not his factual findings are to be given the respect Rule 52(a), Federal Rules of Civil Procedure seems to suggest, i.e., not to be overturned unless clearly erroneous or rather whether the district judge is to be regarded as a mere magistrate issuing a report and recommendation to his three-judge supervisors. Petitioner submits that the former is a more accurate characterization. In Pulman-Standard v. Swint, 456 U.S. 273 (1982), this Court held that the federal appellate court should have applied the clearly erroneous standard to the question of whether differences in a seniority system reflected an intent to discriminate

3/ Judge Carr applied the statute (A. 114).

on account of race. As this Court determined that discriminatory intent was a factual rather than legal or mixed question, 456 U.S. at 287-288, so also petitioner submits is Judge Carr's determination regarding juror Colby's statements concerning her state of mind. Judge Carr's finding that Colby expressed an inability to impartially decide Witt's guilt or innocence (A. 113-114) is not clearly erroneous and the lower court's failure to apply Rule 52(a) merits reversal. 4/

4/ "Colby's statements read in their entirety clearly indicate that her personal beliefs against the death penalty would have prevented her from making an impartial decision as to the Petitioner's guilt or innocence, which is sufficient to justify her exclusion under Witherspoon and Adams. Given that there exists no ironclad rule that responses to questions on voir dire incorporating the phrases 'I think' or 'I am afraid' necessarily involve Witherspoon defects, and reading the responses of

In addition to the district courts, the federal appellate courts are in need of guidance. Petitioner submits (and submitted below - A. 127-128) that the state courts' determination that Colby expressed an inability to impartially decide Witt's guilt or innocence was a finding entitled to a presumption of correctness under 28 U.S.C. §2254(d) and Sumner v. Mata, 449 U.S. 539. The lower court, without explanation, failed to defer to the state court. The federal appellate courts with recurring frequency are noting confusion over the appropriate standard to apply on appeals by habeas prisoners with respect to Witherspoon

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Colby in context, the Court concludes that her exclusion did not violate Petitioner's rights under the Sixth and Fourteenth Amendments. The state court's presumptively correct factual determination should accordingly stand. Sumner, supra."

(A. 113-114)

challenges. O'Bryan v. Estelle, 714 F.2d 365 (5th Cir. 1983); McCorquodale, supra. In O'Bryan, Judge Randall observed that a Witherspoon challenge would seem to be analogous to a complaint of juror bias and recognized that in Smith v. Phillips, 455 U.S. 209 (1982) this Court held that the state court's findings regarding actual bias were presumptively correct under 28 U.S.C. §2254(d). Judge Randall contrasted the deference to the state court finding principle with that of independent de novo review (which accords no weight to the state court determination) and concluded that the matter need not be decided since the state prevailed on the latter, more rigorous standard. 714 F.2d at 372-373. Judge Higginbotham concurred in the result but suggested that the appropriate standard of review should be deference to the state court

findings tempered by an abuse of discretion element. 714 F.2d at 396. Illustrating the confusion further, in yet a third opinion dissenting Judge Buchmeyer suggested that evidentiary hearings be conducted to resolve Witherspoon disputes. 714 F.2d at 401-416. The Eleventh Circuit in McCorquodale v. Balkcom, supra, apparently attempts to combine the concepts of independent de novo review along with according some deference to the trial judge's ability to evaluate the prospective juror's demeanor and tone. Yet, since McCorquodale involved the federal court's agreement with the state court ruling, it remains unclear to what extent the Eleventh Circuit will defer to state court findings under 28 U.S.C. §2254(d) when it merely disagrees with them, or even as intimated by Judge Roney in the denial of the rehearing

petition in this case (A. 77) whether McCorquodale will be applicable in other Witherspoon cases.

Of course, in addition to clarifying their respective functions and responsibilities to the federal courts, the instant case is important because the State of Florida is entitled in a capital prosecution to obtain the services of jurors who can assure the trial judge that they are able and willing to decide impartially an accused's guilt or innocence and to consider the imposition of the ultimate sanction, irrespective of their personal views on the death penalty. Unless such assurances can be given the trial judge does not commit constitutional error by excusing the juror for cause.

The time is ripe for this Court unequivocally to hold that state court

findings that a juror expressed the inability to impartially decide the accused's guilt or innocence is a factual matter, entitled to deference under 28 U.S.C. §2254(d) as articulated in Sumner, Marshall, Fulford, and Goode. Since the lower court failed to accord such deference, summary reversal is required.

Quite apart from the lower court's refusal to apply 28 U.S.C. §2254(d) and Federal Rule 52(a), Rules of Civil Procedure, this Court should grant certiorari review to answer the last two questions presented. The lower court has applied Witherspoon in a formulaic fashion, engaged in a semantic quagmire, and yielded inconsistent results and failed to focus on the essence of Witherspoon and its progeny.

Simply stated, Witherspoon holds

only:

> ". . . that a sentence of death cannot be carried out if the jury that imposed or recommended it was chosen by excluding veniremen for cause simply because they voiced general objections to the death penalty or expressed conscientious or religious scruples against its infliction."
>
> (emphasis supplied)
> (391 U.S. at 522)

A juror may permissibly be excused for cause if the reason for doing so is more than merely voicing general objections or conscientious or religious scruples about it. The state is entitled to assurances from prospective jurors that they can follow the instructions of the judge and apply the law to the case, despite any negative views on capital punishment they may harbor. In this Court's most recent Witherspoon pronouncement, Adams v. Texas, 448 U.S. 38, Mr. Justice White reiterated:

> "[3] This line of cases

establishes the general proposition that a juror may not be challenged for cause based on his views about capital punishment unless those views would prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath. The State may insist, however, that jurors will consider and decide the facts impartially and conscientiously apply the law as charged by the court."

(emphasis supplied)
(448 U.S. at 45)

Clearly, as the underscored words reveal, this Court has not felt that only use of the word prevent can satisfy the Witherspoon inquiry of prospective jurors. The focus properly is on whether the juror's capital views would impair the performance of the duties of the juror. And when a juror says that there is an impediment to the process of guilt or innocence determination, that juror acknowledges that she cannot impartially

decide guilt or innocence. An example will suffice. Prospective juror A responds to a prosecutor's question concerning capital punishment:

> "I have serious personal reservations about capital punishment, but I can set those views aside and weigh evenly the evidence presented and apply the instructions given to me by the judge."

Prospective juror B avers:

> "I am opposed to capital punishment and my views are such that I could decide the defendant's guilt but the burden I would require the state to establish is not guilt beyond a reasonable doubt but rather absolute certainty."

While A should not be excused, Petitioner submits that juror B should be excused for cause. Although he does not state that he could not decide the defendant's guilt, he does establish that he could not do so impartially. His partiality is with the defendant and the state is

not required to accept a juror who is partial to the defense. As stated in Adams:

> "For example, a juror would no doubt violate his oath if he were not impartial on the question of guilt."
>
> (448 U.S. at 44)

See also the concurring opinion of Judge Reavley (joined by Judge Fay) in Burns v. Estelle, 626 F.2d 396 at 398-399 (5th Cir. 1980).

Petitioner would urge this Court to accept the instant petition as the lower court reached a result differently than this Court would have decided; it is necessary to extricate the lower courts from the semantic quagmire they have fallen into, and to provide consistency to the conflicting and seemingly capricious results achieved by the lower courts.

The panel below engages in a semantic exercise finding the phrase "interfere with" "admits of a great variety of interpretations" [5/](A. 63). Presumably, the lower court would have preferred that the inquiry include the word prevent. But prevent can mean to hinder, hinder can mean to impede, and both words are synonyms to interfere with. Since neither the juror nor defense counsel expressed misunderstanding or confusion about the phrase, the lower court's undue rejection of the word should not be sustained. [6/]

5/ A challenge of this nature, being all-pervasive, is difficult to refute. Scarcely can a word in the language be found that is not subject to interpretation. The phrase due process of law is not deemed hopelessly ambiguous despite the fact that it is not chiseled in concrete but contains nuances fleshed out weekly in reported appellate decisions.

6/ The lower court claims that a juror's answer including "I think" is not an impermissible talismanic response

The lower courts have yielded contradictory results on Witherspoon claims. In Granviel v. Estelle, 655 F.2d 673 (5th Cir. 1981), the court found the excusal of juror Harrison improper despite this exchange:

> "Q: Let me ask you if you, personally sitting as a Juror, could ever vote so as to inflict the death penalty?
>
> A: No, I don't think I could.
>
> Q: That is a definite prejudice or feeling that you have that you would not change? You just don't feel like you would be entitled to take another person's life in that fashion.
>
> A: (Venireman nods.)
>
> Q: Okay, you could not?
>
> A: No, I could not."
>
> (Text at 684)

(A. 70) and yet apparently for the lower court only the word prevent may be used in the question propounded.

Subsequently, the en banc court in Williams v. Maggio, 679 F.2d 381 (5th Cir. 1982) approved the excusal of a juror because of a single "No" response amid a sea of "I don't know"s, 679 F.2d at 385. Granviel obtains a new sentencing hearing, Williams does not (and is later executed) [7] despite juror responses which are for all practical purposes indistinguishable. [8]

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[7] This Court vacated a stay of execution in Maggio v. Williams, ___U.S.___, 78 L.Ed.2d 43 (1983).

[8] Petitioner notes that the lower court initially had opined that Granviel "turned upon the ambiguity of the venireperson's answers, which were virtually identical to those in this case" - (A. 69) but withdrew this language in the order denying rehearing (A. 75-76). The court's action is understandable since juror Harrison's responses were not, in petitioner's view, ambiguous and the dissent in Granviel was correct. Petitioner alludes to it here, not in an effort to relitigate Granviel but only to show the inexplicably different results reached by the federal appellate courts.

In the instant case, Judge Roney initially concurred in the result although doubting "the soundness of the analysis which leads to the reversal under Witherspoon v. Illinois" (A. 72) and thereafter opined that rehearing should be granted in light of McCorquodale v. Balkom, supra, (A. 77). The dissenting judges in McCorquodale opined that the majority's approval of juror excusal is inconsistent with Burns v. Estelle, 592 F.2d 1297 (5th Cir. 1979); Granviel, supra; Hance v. Zant, 696 F.2d 940 (11th Cir. 1983) and the instant case. Even more recently in Davis v. Zant, ____F.2d____ (11th Cir. Case No. 83-8244, December 27, 1983), the court suggested that excusal of a juror was proper because of his numerous affirmations of objection although several of the juror's statements did not suggest a

clear and unambiguous statement of opposition.

The result reached by the lower court is not compelled by Adams v. Texas, 448 U.S. 38 (1980). In that case, Texas law required excusal unless a juror stated under oath that the penalty of death or life imprisonment would not affect the deliberations on any issue of fact. In the instant case, juror Colby articulated more than that she would treat the issues with the utmost seriousness — she repeatedly acknowledged an unwillingness or inability impartially to decide the defendant's guilt or innocence.

Similarly, the lower court's attempt in the opinion denying rehearing (A. 74-77) in Procrustean fashion to stretch the instant case to fit Burns v. Estelle, 626 F.2d 396 (5th Cir. 1980)

must fail. There not only did the excused juror only state that her views would affect her deliberations on any issue of fact but also defense counsel was denied his request to ask additional clarifying questions. 626 F.2d at 398. Sub judice, juror Colby declared her views would impair the guilt-determining process and defense counsel who was present to observe her tone and demeanor made no attempt to demonstrate she could qualify as a juror. The lower court ignored this extremely relevant factor in this case although both the Fifth and Eleventh Circuits have found that circumstance to be significant if not dispositive. O'Bryan v. Estelle, 714 F.2d at 382; McCorquodale, slip opinion, page 18.

The petitioner maintains that as in the O'Bryan case, the instant case in-

volves an initial, adequate declaration by the juror which prima facie reflects her inability to decide Witt's guilt or innocence impartially. Excusal was appropriate at that point and it was incumbent upon defense counsel if dissatisfied to demonstrate by further questioning that in fact the juror was a qualified one. Failure to do so should result in acceptance of the state court's finding that she had expressed the inability to perform her functions as a juror.

The federal appellate courts have too long been permitted carte blanche in disposing of Witherspoon claims. While they form a useful role in the criminal justice system, they are not solely capable of applying this Court's pronouncements. In the instant case, neither trial judge, defense lawyer, nor juror indicated confusion or misunder-

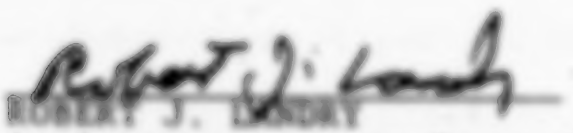
standing during the colloquy; the state Supreme Court and the United States District Court unanimously agreed that excusal for cause was appropriate — yet two judges on the panel below substitute their view on a factual matter.

CONCLUSION

This Court should summarily reverse the Eleventh Circuit Court of Appeals; alternatively, the instant petition should be granted and the Court allow plenary review.

Respectfully submitted,

JIM SMITH
ATTORNEY GENERAL



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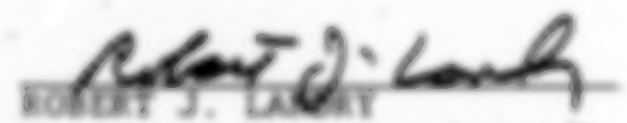
I, ROBERT J. LANDRY, Counsel for Petitioner, and a member of the Bar of the United States Supreme Court, hereby certify that on the 27th day of February, 1984, I served three copies of the Petition for Writ of Certiorari on William C. McLain, Esquire, Assistant Public Defender, Chief, Capital Appeals, Hall of Justice Building, 455 North Broadway, Bartow, Florida 33830-3798 by a duly addressed envelope with postage prepaid.



ROBERT J. LANDRY
Assistant Attorney General

Case No.

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1982

LOUIE L. WAINWRIGHT, Secretary,
Department of Corrections,
State of Florida,

Petitioner,

v.

JOHNNY PAUL WITT,

Respondent.

APPENDIX
FOR

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

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JOHNNY PAUL WITT,

Petitioner-Appellant

v.

LOUIE L. WAINWRIGHT,

Respondent-Appellee.

No. 81-5750

United States Court of Appeals,
Eleventh Circuit

September 16, 1983.

Petitioner, who was convicted of first-degree murder in Florida and sentenced to death, appeals from an order of the United States District Court for the Middle District of Florida, George C. Carr, J., which denied his petition for writ of habeas corpus. The Court of Appeals, Tuttle, Senior Circuit Judge, held that: (1) district court did not err in concluding that petitioner, who chose to extend his discussions with police

officer beyond initial unrelated subject matter to encompass murder of a child, knowingly, intelligently, and voluntarily waived his right to an attorney and his privilege against self-incrimination prior to confessing to child's murder, and (2) trial court committed error of constitutional dimension when it dismissed for cause a prospective juror in murder trial who expressed her opposition to the death penalty but who failed to indicate her unequivocal inability to apply the law as charged.

Affirmed in part, vacated in part, and reversed in part and remanded.

Koney, Circuit Judge, filed specially concurring opinion.

1. CRIMINAL LAW 517.2(2)

District Court did not err in concluding that petitioner, who chose to extend his discussions with police officer beyond initial unrelated subject matter to encompass murder of a child, knowingly, intelligently, and voluntarily waived his right to an attorney and his privilege against self-incrimination prior to confessing to child's murder.

2. CRIMINAL LAW 641.3

Petitioner was entitled to assistance of counsel after his first appearance before county judge following his arrest.

3. HABEAS CORPUS 30(3)

Petitioner, who was convicted of first-degree murder in Florida and sentenced to death, was not entitled to federal habeas relief on basis of his allegation that Florida Supreme Court

relied on nonrecord information, such as psychiatric and presentence investigation reports, in direct review of his conviction and sentencing.

4. CRIMINAL LAW 412.1(2), 412.2(1)

Petitioner's Fifth Amendment privilege against self-incrimination and Sixth Amendment right to counsel were not violated by use at penalty stage of trial of testimony of psychiatrist who examined petitioner for purpose of assessing his competency to stand trial on murder charge, despite fact that court-appointed psychiatrist who examined petitioner failed to warn him that anything he said could be used against him in court, where petitioner allowed psychiatrist to testify for petitioner's own tactical reasons. U.S.C.A. Const.Amends. 5, 6.

5. HOMICIDE 354

In light of existence of only a

single and insubstantial mitigating circumstance, i.e., petitioner's age, Florida Supreme Court justifiably applied a harmless error rule to affirm a death sentence for a murder despite existence of nonstatutory aggravating factors.

6. JURY 108

Trial court committed error of constitutional dimension when it dismissed for cause a prospective juror in murder trial who expressed her opposition to the death penalty but who failed to indicate her unequivocal inability to apply the law as charged.

Appeal from the United States District Court for the Middle District of Florida.

Before RONEY and KRAVITCH, Circuit Judges, and TUTTLE, Senior Circuit Judge.

TUTTLE, Senior Circuit Judge:

Johnny Paul Witt appeals from the district court's denial of his petition for a writ of habeas corpus. Petitioner was convicted of first degree murder in Florida and sentenced to death. In this appeal, he challenges the district court's determination of his claims regarding: (1) the admission into evidence of inculpatory statements rendered after he requested an attorney; (2) the Florida Supreme Court's alleged use of non-record material in reviewing his sentence; (3) the admission into evidence during the penalty phase of petitioner's trial of testimony by psychiatrists to whom petitioner had made inculpatory statements during a competency and sanity examination; (4) the trial court's reliance upon nonstatutory aggravating circumstances in

the sentencing order; and (5) the excusal of three prospective jurors for cause based upon their opposition to the death penalty.

We find, after a thorough review of the entire record, that the district court properly disposed of the first three of petitioner's claims listed above. We are unable to agree with the district court, however, that the trial court did not commit error of constitutional dimension when it dismissed for cause a prospective juror who expressed her opposition to the death penalty, but who failed to indicate her unequivocal inability to apply the law as charged. This error mandates our reversal of the district court's decision denying petitioner's request for resentencing.

I. BACKGROUND

Petitioner was convicted of first

degree murder for the October 28, 1973, killing of 11 year old Jonathan Kushner. Witt, then 30 years old, was bow and arrow hunting with his younger friend, Gary Tillman. The two apparently had spoken about killing a human on other occasions and even had stalked persons like animal prey.

On the day of the murder, Witt and Tillman were hunting in a wooded area near a trail often used by children. Tillman apparently struck the victim, who was riding his bicycle along a path through the area, on the head with a star bit from a drill. At that point, Witt assisted Tillman in gagging Kushner and placing him in the trunk of Witt's car. Petitioner and Tillman then drove to a deserted grove and opened the car trunk. The victim was dead, as a result of suffocating from the gag. The two dug a grave for the Kushner

boy and then slit his stomach so it would not bloat. Before burying the victim, Witt and Tillman performed various acts of sexual perversion and violence to Kushner's body.

Defendant was found guilty of first degree murder, Fla.Stat.Ann. 782.04(1) (West Supp.1982), after a jury trial. On February 21, 1974, Witt was sentenced to death, in accordance with the jury's recommendation, by the Circuit Court for the Seventh Judicial District for Volusia County, Florida. The Florida Supreme Court affirmed that decision on direct review. Witt v. State, 342 So.2d 497 (Fla.), cert. denied 434 U.S. 935, 98 S.Ct. 422, 54 L.Ed.2d 294, reh. denied 434 U.S. 1026, 98 S.Ct. 755, 54 L.Ed.2d 774 (1977). Petitioner then moved to vacate, set aside, or correct the sentence under

Fla. R. Crim. P. 3.850. His motion was denied. The Florida Supreme Court affirmed this decision. Witt v. State, 387 So.2d 922 (Fla.), cert. denied, 449 U.S. 1067, 101 S.Ct. 796, 66 L.Ed.2d 612 (1980).

Petitioner sought federal habeas relief from the United States District Court for the Middle District of Florida. That court denied Witt's petition initially and, after an evidentiary hearing on the Witherspoon issue, affirmed its prior memorandum decision. Petitioner filed a notice of appeal on June 24, 1982. After hearing oral argument in this case, we deferred consideration pending the decision in this Court's en banc case, Ford v. Strickland, 696 F.2d 804 (11th Cir. 1983), which addresses several issues we face here. We now proceed to a consideration

of Witt's claims.

II. THE MIRANDA ISSUE--ADMISSIBILITY OF PETITIONER'S CONFESSION

[1] Petitioner was arrested during the afternoon of November 5, 1971. The district court found the following sequence of events transpired. Witt was given the standard Miranda warning and brought to the county jail where he was interrogated simultaneously by sheriff's deputies, an FBI agent, and an assistant state prosecutor. Petitioner requested an attorney soon after the questioning began. The interrogation at that point properly ceased.

Witt was left in the interrogation room under the custody of Lt. Arnie Myers of the Hillsborough County Sheriff's Department. Lt. Myers testified that petitioner began to complain about the interogation. Myers claims he cut off

Witt's discussion by informing Witt that he was not authorized to discuss the Kushner case. Witt apparently then asked Myers if all of the sheriff's murder cases were solved, and Myers responded by asking which case Witt had in mind. Witt told Myers that Tillman, his co-defendant, possibly had information on the murder of a young girl named Gail Joyner. Myers' interest was piqued because he was working on the Joyner investigation at the time. Soon after the statement, officers arrived to take Witt to his prison cell for the night. Myers testified that Witt said he would like to continue their discussion the next day, presumably referring to the Joyner case.

On the next day, November 6, Witt had his first appearance before a county judge. Witt was represented by an attorney from the public defenders' office. It

is unclear, however, whether petitioner actually consulted with the attorney, even though he requested such an opportunity. On November 7, Myers went to Witt's cell in the early morning to continue their discussion from two days previously. On the way to the interrogation room, Myers read petitioner his rights in accordance with routine police procedures.

Upon arriving at the interrogation room, Witt asked Myers if he had spoken to Tillman yet. Myers responded that he had not, but that someone else had. Witt then asked what Tillman said, to which Myers answered he did not know. Petitioner then was silent for awhile, according to Myers, until he stated that his co-defendant would probably attempt to pin the blame upon him, apparently referring to the Kushner, and not the Joyner, case.

Witt asked Myers for paper and pen, which Myers provided, along with a waiver of rights form. Myers read this waiver form and asked Witt if he understood its contents; Witt responded affirmatively. Myers testified that reading the waiver form was routine police procedure when giving a prisoner writing materials during a questioning session. Witt then wrote out a 13 page confession over the course of several hours. Agent Fred Barnesdale, also of the Hillsborough County Sheriff's Department, joined Myers at some point while Witt was writing his confession. Barnesdale asked Witt several questions that secured Witt's cooperation in revealing the locations of various aspects of the crime. Witt also tendered an oral confession during the course of November 7. Petitioner's motion to suppress his

confession was denied by the trial court on February 12, 1974.

Petitioner contends that his confession was extracted in violation of the constitutional principles set forth in Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966), and Edwards v. Arizona, 451 U.S. 477, 101 S.Ct. 1880, 68 L.Ed.2d 378 (1981). Petitioner argues that the waiver of his right to counsel, while perhaps voluntary, was not intelligent and knowing. He urges that the initiation by the police of further custodial interrogation after he had unambiguously expressed his desire to consult with an attorney constituted improper coercion. Petitioner concludes that his confession and all evidence stemming from it were inadmissible as violative of his Fifth Amendment right against self-incrimination

and his Sixth Amendment right to counsel.

In Miranda, the United States Supreme Court made it clear that the government must show by a "heavy burden" that a waiver of these constitutional rights was voluntary, knowing, and intelligent. 384 U.S. at 475, 86 S.Ct. at 1628. The Miranda doctrine requires that:

> An uncounseled confession may not be introduced into evidence against a criminal defendant unless the government can sustain its "heavy burden" of proving that the defendant has waived his right against self-incrimination and his concomitant right to the presence of counsel and that his waiver was "voluntary, knowing and intelligent."

Nash v. Estelle, 597 F.2d 513 (5th Cir. 1979)(en banc), quoting Miranda, 384 U.S. at 475, 86 S.Ct. at 1628. In Edwards, the Court clarified the rights of an accused person held in custody who has expressed his or her desire to speak with an

attorney. The Court stated:

> [A]n accused . . .. having expressed his desire to deal with the police only through counsel, is not subject to further investigation by the authorities until counsel has been made available to him, unless the accused himself initiates further communication, exchanges, or conversations with the police.

451 U.S. at 484-85, 101 S.Ct. at 1884-85.

The district court originally relied upon the state court's finding that Witt expressed his desire to confess during a "casual conversation" in his cell on the morning of November 7. Soon after the district court entered its initial memorandum decision, the Supreme Court issued Edwards v. Arizona. The district court commendably decided to hold an evidentiary hearing on the Miranda issue, in light of Edwards, and reconsidered its initial decision. The court frankly admitted that there was scant record support for the

state court's conclusion, upon which the district court had relied. The district court concluded, however, that Witt initiated further contacts with the police after his request for an attorney and that his Fifth and Sixth Amendment rights were therefore not violated.

[2] We find, at the outset of our analysis, that there is no merit to the State's argument that petitioner's right to an attorney had not yet attached at the stage of custodial interrogation being challenged. Petitioner indisputably was entitled to the assistance of counsel after his first appearance before the county judge on November 6. See Brewer v. Williams, 430 U.S. 387, 388-89, 97 S.Ct. 1232, 1234-35, 51 L.Ed.2d 424 (1977).[1]

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[1] It is unnecessary, for the disposition of this issue, for us to consider

The district court's finding that petitioner made a voluntary, knowing, and intelligent waiver of his right to counsel before his confession depended on credibility choices. Witt's testimony conflicted dramatically with that of Myers. The court explicitly credited Myers' testimony. This decision is binding upon our Court absent clear error. Based upon a consideration of the totality of the circumstances surrounding petitioner's confession, we conclude that there is sufficient evidence on the record to support the district court's determination of the confession's admissibility.

Testimony at the federal habeas

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petitioner's right to counsel on November 5, although we are inclined to believe that the guarantees acknowledged in Brewer should be afforded to petitioner on that date as well.

evidentiary hearing indicates that Witt initiated the November 5 discussion with Myers about the Joyner case. The testimony also supports the conclusion that Myers initiated the discussion on the morning of November 7 to follow-up their discussion of two days earlier, at Witt's invitation, and with the genuine belief that Witt intended to discuss the Joyner investigation and not the murder involved in this action.[2]

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2 Myers' testimony in this regard, on direct examination, was as follows:

> Q. So he asked you to come back and visit him the next day so he could conclude his discussion about the Joyner case?
>
> A. Yes sir.
>
> Q. Okay. Now at the conclusion of that meeting on November 5, was it Mr. Witt who suggested that you come back and talk to him some more about the Joyner case?

Therefore, Myers' questioning of Witt on November 7 was not impermissible.

> A. Yes.
>
> Q. Now, what was your purpose for going to see Mr. Witt on November 7?
>
> A. I felt pretty certain that he would do what he said and help me on the Gail Joyner case, and I felt that with the information that he could provide, I could subsequently talk to Mr. Tillman and shed some light on the Gail Joyner case.

Myers testified on cross-examination as follows:

> Q. And I believe you testified that he asked you to come back to talk to you again, not about the Kushner case, but about the Joyner case; is that correct?
>
> A. He didn't specify. He just said--we ended up talking about Gail Joyner, and he said, "Come get me tomorrow; we can finish this conversation."
>
> Q. But it was your belief he wanted to talk about the Joyner case?
>
> A. Yes sir.

The record also fairly supports the conclusion that it was petitioner who initiated discussion of the Kushner case on

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The state offered into evidence at the evidentiary hearing a "Continuation Report" written by Lt. Myers on November 3, shortly after his first encounter with petitioner. That report materially contradicts Myers' version of the facts as recounted during his oral testimony. Myers wrote:

> I sat silently, suddenly Mr. Johnny Paul Witt related that he find [sic] it difficult to talk to police officers. He qualified that statement by saying: "I don't have that problem with someone like you" "from an oppressed group." [Lt. Myers is a black male]. I again advised Johnny Witt that I didn't want to question him in reference to the Kushner case. I stated that if he wanted to talk with someone I would get the officer who originated this report back into the interrogation room, he said no I don't trust them, etc. I advised Johnny Witt that I didn't know much about it, the disappearance of Jonathon [sic] Kushner. We were silent again for a short period when Johnny Witt broke the silence by

November 7. Myers read Witt his rights in accordance with routine police procedure. Witt decided to confess on his own.

> asking; "have you'll [sic] solved all your murder cases?". I said, "which one do you have in mind?" At this point I suggested to Johnny Witt that if there was something he wanted to talk about to wait until after he had first talked with his attorney. He stated he didn't have any money. I told him the courts would appoint one free, without cost. At this point I went through the complete procedure (constitutional rights) based on the Mirander [sic] decision. Johnny Witt stated that if I had just one more day, I would have turned myself in. He interrupted his school of thought by saying "maybe Gary can tell you something about these unsolved murders, I would like to help you. [sic] I stated that I didn't know of any [sic] he asked, "what about the girl with the raccoon" [the Joyner case]. I said, do [sic] Gary know about that?" He stated, "ask him, he probably do" [sic].
>
> I stated to Mr. Witt that I would talk to Gary Tillman

with no apparent prompting or coercion by the police, and only after he had been informed of his rights two times, the second

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whenever I got the opportunity. I asked Mr. Johnny Witt has he hunted in the area before, this was in reference to where Jonathan [sic] Kushner disappeared. . . . Johnny Witt stated he was out there approx. two weeks prior to the Kushner deal. I asked him was there any kids out there playing, he said, yes, in fact, I ran a little girl away from the area I was in. I told her she might get hurt, to leave. I asked him was he alone, he stated that he was, and that he was driving a yellow car. At this point he asked for more coffee, and I responded as I had earlier. When I returned with the coffee Johnny Witt stated he couldn't think very well, but would talk with me later. At this point our conversation terminated. (Emphasis added).

This account of Myers' first encounter with Witt indicates that it was Myers who initiated the discussion of the murder in the instant action, after Witt had requested an attorney.

We cannot escape the fact that the

with every indication of careful regard for Witt's genuine understanding. The introduction of questions by Agent Barnesdale about the location of certain acts of the crime did not result in any qualitative difference in petitioner's custodial interrogation. We do not find that Barnesdale extended the subject matter of inquiry beyond those categories already broached by petitioner's voluntary acts.

We are unable to conclude, as petitioner suggests, that the Hillsborough police ignored Witt's repeated requests

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district court had this testimony before it when it rendered its opinion. The court chose to credit Myers' oral testimony in reconstructing the facts surrounding Witt's confession. Since there is substantial support on the record for the district court's account of the facts, we are unable to find that the district court clearly erred in this regard. The result of this conclusion is that Myers' written Continuation Report has no bearing on our Miranda analysis.

for an attorney. The record clearly indicates otherwise. Nor do we find that the police so wore petitioner down, through various pressure tactics and lack of sleep, that his confession was for all practical purposes coerced. The only support for these allegations comes from the testimony of petitioner himself, which the district court found as undeserving of credence. There is no reliable evidence of bad faith in Witt's treatment by the police.3

In sum, we conclude that the district court did not err in concluding that petitioner knowingly, intelligently, and voluntarily waived his right to an attorney

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3 There is no indication here that the repeated recitation of Miranda warnings, in the face of Witt's unambiguous and repeated requests for an attorney, was anything but routine police procedure designed to comply with constitutional dictates.

and his privilege against his privilege against self-incrimination. Lt. Myers merely followed up on a line of inquiry opened up by Witt himself. Witt later chose, albeit unwisely from his perspective, to extend his discussions with Myers beyond the initial subject matter to encompass the murder of the Kushner child. No constitutional principles are violated by the admission into evidence of petitioner's confession.

III. THE BROWN ISSUE--NON-RECORD MATERIAL BEFORE THE REVIEWING COURT

[3] Petitioner argues that the Florida Supreme Court relied on non-record information, such as psychiatric and pre-sentence investigation reports, in the direct review of his conviction and sentencing. Petitioner claims that this practice infringed on his constitutional guarantees including the right to due process of law,

the effective assistance of counsel, confrontation, freedom from cruel and unusual punishment, and the protection against compelled self-incrimination.[4] He argues that the use of this material runs afoul of the principles of Gardner v. Florida, 430 U.S. 349, 97 S.Ct. 1197, 51 L.Ed.2d 393 (1977) (petitioner was denied due process when death sentence was imposed, at least in part, on the basis of information that he had no opportunity to deny or explain).

The en banc court in Ford v. Strickland, 696 F.2d 804 (11th Cir. Jan 7, 1983) (en banc), denied an identical claim in that action. The Ford court relied upon the Florida Supreme Court's opinion in

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4 Petitioner alleges violations of his Fifth, Sixth, Eighth, and Fourteenth Amendment rights.

Brown v. Wainwright, 392 So.2d 1327, cert. denied, 454 U.S. 1000, 102 S.Ct. 542, 70 L.Ed.2d 407 (1981),[5] to conclude that:

> Even if members of the [Florida Supreme C]ourt solicited the material with the thought that it should, would or might be used in the review of capital sentences, the decision of the Florida court that it should not be so used, the statement that it was not used, and the rejection of the notion that it affected the judgment of the court ends the matter when addressed at the constitutional level.

Ford v. Strickland, 696 F.2d at 811. Due to the absence of any indication contrary to the above statement in the instant action, we must deny petitioner's Brown claim.

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5 Brown v. Wainwright was a direct petition for writ of habeas corpus by 123 Florida death row inmates alleging the same facts of the solicitation of non-record materials during the pendency of their capital case appeals. The Florida Supreme Court denied class relief.

IV. THE SMITH ISSUE-AMISSIBILITY OF PENALTY PHASE PSYCHIATRIC TESTIMONY

[4] After reviewing petitioner's military medical records and reports from two court-appointed psychiatrists who examined petitioner, the trial court determined on January 8, 1974, that Witt was competent to stand trial. The court-appointed psychiatrist examined petitioner without warning him that anything he said could be used against him in court. One of the psychiatrists, however, informed Witt that he had a choice whether to submit to the examination. The psychiatrists later testified, during the penalty phase of petitioner's trial, that Witt had an incurable propensity to commit future violent crimes, that he was a menace to society, and that he was a sexual pervert. The trial judge explicitly relied on some of

these factors in reaching his sentencing decision.

Petitioner argues that his Fifth Amendment privilege against self-incrimination and his Sixth Amendment right to counsel were violated by use of this psychiatric testimony where the psychiatrist failed to warn petitioner that the results of the examination would be used against him in court and that he had the right to remain silent. After the district court issued its decision in this case, but before petitioner's motion to alter, amend, or set aside the judgment, the Supreme Court issued its decision in Estelle v. Smith, 451 U.S. 454, 101 S.Ct. 1866, 68 L.Ed.2d 359 (1981). In Smith, the Court squarely held that use of such psychiatric testimony, secured without adequate warnings to the defendant in the

context of a limited and neutral competency examination, constitutes a violation of that defendant's Fifth and Sixth Amendment rights when used by the state during the sentencing phase.

Were petitioner's claims so straightforward, we would not hesitate to find Smith controlling. The district court, however, identified three distinctions between Smith and the instant action. First, the evidence adduced was not probative as to any of the statutory aggravating circumstances the sentencer was entitled to consider, as was the evidence in Smith under Texas law. Second, the defendant, rather than the trial judge, requested the competency examination. Third, the defendant allowed the psychiatrist to testify for his own tactical reasons and thereby waived any objection to such testimony.

It is irrelevant who actually requested the examination, where it was conducted for the limited purpose of assessing petitioner's competency to stand trial. Also, whether the psychiatric evidence adduced at the sentencing phase supported a proper statutory aggravating circumstance or not, the fact remains that this prejudicial information was still considered. Despite these areas of disagreement with the district court's decision, we affirm the district court's disposition of this issue. Petitioner's trial attorney did not object to introduction of the psychiatric evidence. Testimony by Witt's attorney clearly indicates that petitioner would have called the psychiatrist to testify during the sentencing phase of his trial had the state failed to do so. Petitioner's failure to object was purely tactical and did not, as

Witt suggests, result from his unawareness that the state would use such evidence or from his improper assessment of how damaging the testimony would ultimately prove to be.

The Supreme Court in Smith recognized that the rule there stated should not invalidate sentences such as the one in this case. The Court noted that, "a different situation arises where a defendant intends to introduce psychiatric evidence at the penalty phase . . ." 451 U.S. at 472, 101 S.Ct. at 1878. Since petitioner is unable to show cause to qualify for exception from the procedural default bar of Wainwright v. Sykes, 433 U.S. 72, 97 S.Ct. 2497, 53 L.Ed.2d 594 (1977), we find that Witt has failed to state a meritorious Smith claim.

V. CONSIDERATION OF NON-STATUTORY AGGRAVATING CIRCUMSTANCES

[5] Perhaps the most difficult issue petitioner raises is his claim that the trial court improperly relied upon four non-statutory aggravating circumstances in reaching its sentencing determination. Petitioner urges that two distinct problems result from this reliance. First, several of the non-statutory aggravating circumstances by themselves are arguably constitutionally impermissible bases for a sentence of death. See Godfrey v. Georgia, 446 U.S. 420, 100 S.Ct. 1759, 64 L.Ed.2d 398 (1980). Second, according to petitioner, the use of non-statutory aggravating circumstances results in an unconstitutionally broad degree of sentencer discretion, thus raising the same concerns which convinced the Supreme Court to strike down the death penalty in Furman v. Georgia. 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972).

The trial court found four aggravating circumstances in support of the sentence of death:

> (A) That the Defendant, Johnny Paul Witt, murdered Jonathan Mark Kushner from a premeditated design and while engaged in the commission of a felony, to wit: Kidnapping.
>
> (B) That the Defendant, Johnny Paul Witt, has the propensity to commit the crime for which he was convicted; to wit: Murder in the First Degree and thus his continued existance [sic] presents a great risk of death to many persons.
>
> (C) That the murder, kidnapping of Jonathan Mark Kushner by the Defendant, Johnny Paul Witt, was especially heinous, atrocious and cruel.
>
> (D) That the Defendant knowingly through his voluntary and intentional acts leading up to and during the course of the commission of the offense for which he was convicted created a great risk of serious bodily harm and death to many persons.

In addition the trial judge made the following statement at the end of his

findings:

> Therefore, it is the Opinion and Determination of the Court, and the Court so finds, that the aggravating circumstances far outweigh the mitigating circumstances [sic] in this cause, and the testimony of these psychiatrists indicate that the Defendant, Johnny Paul Witt, is a menace to society as his past actions have indicated beyond doubt. In addition, the psychiatrist could give no promise of rehabilitation for the Defendant.

Petitioner argues that, of the four aggravating circumstances recited by the trial judge, only the first, dealing with the commission of a felony, is permissible under Florida law. He refers to various Florida cases in which that state's Supreme Court has held improper and at times unconstitutional the consideration of the other aggravating circumstances upon which the trial court relied.[6]

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6 See Halliwell v. State, 323 So.2d 557, 561 (Fla. 1975) (not use evidence of post-mortem acts); Miller v. State, 373

The State advances the argument in our Court that a reviewing court should uphold a death sentence so long as the trial court stated its reliance on at least a single permissible statutory aggravating circumstance. This argument implies an irrebuttable presumption that the trial judge would have ruled in favor of a sentence of death even absent the impermissible aggravating circumstances. The district court was unpersuaded by petitioner's arguments in this regard. The court found that the sentencing judge explicitly found two proper aggravating circumstances and only one mitigating circumstance, petitioner's age, which was of minor significance. The district court

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So.2d 882, 885-86 (forbidding use of aggravating circumstance that the defendant was "incurable"); Kampff v. State, 371 So.2d 1007, 1009 (Fla. 1979) (no great risk of harm where only victim and perpetrators present during crime).

reasoned that petitioner's case was dissimilar to Elledge v. State, 346 So.2d 998 (Fla. 1977), where the Florida Supreme Court ordered resentencing when the trial judge relied on improper non-statutory aggravating circumstances, but rather was controlled on the facts by Brown v. State, 381 So.2d 690 (Fla. 1980). In Brown, the trial judge also found at least two properly established statutory aggravating circumstances and only the mitigating circumstance of age. The Florida Supreme Court in Brown concluded that, "[t]he weighing process has not been compromised" where the court found, from the circumstances, that it "can know" that the result of the weighing process would not have been different had the impermissible factors not been present.

Our problem with this disposition is,

quite simply, in fathoming just how a reviewing court goes about "knowing," with any degree of certainty adequate to meet the "reasoned judgment" test applicable to capital cases, those factors a jury or a trial judge would find persuasive in deciding between life and death. In this instance, we do not hesitate to disparage our own ability to "know" about such complex and profound issues of sentencing in capital cases. Nevertheless, the Supreme Court has now resolved this issue in Zant v. Stephens, __ U.S.__ 103 S.Ct. 2733, 77 L.Ed.2d 235 (1983), and Barclay v. Florida, __U.S.__, 103 S.Ct. 3418, 77 L.Ed.2d __ (1983). In Stephens, the Court upheld a death sentence affirmed by the Supreme Court of Georgia although the sentencing jury had considered a nonstatutory aggravating circumstance. Although the

Court stated as one of its reasons for its decision the absence of any requirement under the Georgia law for the jury to weigh extenuating against aggravating circumstances, the Court in Barclay reached the same result by affirming the Florida Supreme Court although under the Florida statute balancing or weighing is required.

A plurality of the Supreme Court in Barclay stated that, "mere errors of state law are not the concern of this Court, Gryger v. Burke, 334 U.S. 728, 731 [68 S.Ct. 1256, 1257, 92 L.Ed. 1683] (1948), unless they rise for some other reason to the level of a denial of rights protected by the United States Constitution." __U.S. at __, 103 S.Ct. at 3428 (Rhenquist, J., joined by Burger, C.J., & White & O'Connor, JJ.). The plurality concluded that the consideration of nonstatutory

aggravating circumstances there did not meet this test because "[t]here is no reason why the Florida Supreme Court cannot examine the balance struck by the trial judge and decide that the elimination of improperly considered aggravating circumstances could not possibly affect the balance." Id.

The Court's decision in Barclay was reached in light of the facts of Barclay's appeal, that there were no circumstances which mitigated the appellant's crime. Indeed, in characterizing the harmless error rule that the Court undertook to review, the plurality recognized the limited factual applicability of that rule:

> One question that has arisen is whether defendants must be resentenced when trial courts erroneously consider improper aggravating factors. If the trial court found that some mitigating circumstances exist,

> the case will generally be remanded for resentencing. Elledge v. State, 346 So.2d 998, 1002 - 1003 (Fla. 1977). See e.g., Moody v. State, 418 So.2d 989, 995 (Fla. 1982); Riley v. State, 366 So.2d 19, 22 (Fla. 1979). If the trial court properly found that there are no mitigating circumstances, the Florida Supreme Court applies a harmless error analysis. Elledge, supra, at 1002 - 1003. See, e.g., White v. State, 403 So.2d 331 (Fla. 1981); Sireci v. State, 399 So.2d 964, 971 (Fla. 1981).

__U.S. at __, 103 S.Ct. at 3426 - 27. The Court also examined those further limitations on Florida's harmless error rule which counsel for resentencing even where the trial court properly found no mitigating circumstances. See __U.S. at __, 103 S.Ct. at 3426 - 27. It was with this understanding, then, that the plurality of the Supreme Court validated the constitutionality of the procedures employed in Barclay.

This Circuit, in a habeas appeal very similar on its facts to petitioner's, recently decided to rule on the nonstatutory aggravating circumstances issue even though the Supreme Court then had yet to dispose of Barclay and Stephens. In Goode v. Wainwright, 704 F.2d 593 (11th Cir. 1983), the trial judge had considered the nonstatutory aggravating circumstance that Goode could not be rehabilitated and that he possibly would kill again, in addition to three statutory aggravating and substantial mitigating circumstances. The Court referred to this characteristic as the "recurrence factor." Goode, 704 F.2d at 604. The trial judge in the instant action relied upon the identical factor, finding Witt "a menace to society" with "no promise of rehabilitation." There are strong indications in the Findings of Fact

that the trial court considered this recurrence factor as highly significant in imposing the death sentence on Witt.

In Goode, our Court concluded that the Eighth and Fourteenth Amendments were violated because reliance on this extraneous factor introduced an arbitrary element into the sentencing decision, in contravention of Furman and its progeny. Id. 704 F.2d at 609 - 10. The arbitrariness of the death sentence resulted from the trial court having ignored the holding of Miller v. State, 373 So.2d 882 (Fla. 1979), that potential defendants cannot be sentenced to death in reliance upon the probability that they could not be rehabilitated and therefore probably would repeat their acts of violence. The Court emphasized that the execution of Goode would be "freakish" because Florida does

not otherwise permit reliance on the recurrence factor in sentencing. Also see Henry v. Wainwright, 661 F.2d 56, 60 (5th Cir. 1981) (Unit B) ("the limitations of the statute make the death penalty constitutional. Ignoring these limitations implicates the Constitution."), vacated and remanded on other grounds, 457 U.S. 1114, 102 S.Ct. 2922, 73 L.Ed.2d 1326, judgment reinstated, 686 F.2d 311 (5th Cir. 1982), vacated and remanded for further consideration in light of Barclay v. Florida, __ U.S. _, 103 S.Ct. 3418, 77 L.Ed.2d __ (1983).

The Court in Goode felt free to examine these issues despite the pendency of certain similar concerns before the Supreme Court in Barclay and Stephens. In Goode, the Court recognized "that there is a possibility of a Supreme Court ruling

that a state may constitutionally permit the consideration of a nonstatutory aggravating factor under some circumstances." Goode, 704 F.2d at 612 n.26. Nonetheless, the Court indicated that resolution of the Goode case should not be delayed pending action by the Supreme Court:

> [N]either [Barclay nor Stephens] challenges a death sentence which was imposed in reliance upon an aggravating factor which the state procedures themselves forbid; and neither case involves the proposed execution of a defendant notwithstanding that all others in the state would have been entitled to resentencing under the circumstances. For these reasons, we do not anticipate that either case would affect our decision in the instant case and accordingly we decline to delay our decision pending disposition of Barclay and Stephens.

Id. 704 F.2d at 612 n. 26. The Goode panel concluded that the Florida rule -- i.e., the "can know" standard pursuant to which the Florida Supreme Court has on

occasion determined that, there being no mitigating circumstances, it "can know" that the weighing process was not affected by the consideration of an improper aggravating circumstance and thus affirmed the death sentence, see Elledge v. State, 346 So.2d at 1002 - 03, which the Supreme Court upheld in Barclay - was not applicable because in Goode "there were substantial mitigating circumstances." 704 F.2d at 612. Both the Goode Court and the Ford en banc Court characterized the Florida rule as a harmless error rule or as an evaluation very similar to a harmless error rule, applicable when the trial judge has found a complete absence of mitigating factors. See Elledge, 346 So.2d at 1002 - 03 ("The absence of mitigating circumstances becomes important, because, so long as there are some

statutory aggravating circumstances, there is no danger that nonstatutory circumstances have served to overcome the mitigating circumstances in the weighing process."). This Court's decision in Goode therefore would seem to retain its viability even in light of Barclay.

However, it has been called to our attention that the Supreme Court of Florida in Brown affirmed a death sentence notwithstanding the presence of a mitigating circumstance, i.e., age, of "some minor significance." 381 So.2d at 696. And Hargrave v. State, 366 So.2d 1 (Fla. 1978), affirmed a death sentence despite the relatively insignificant error involving the "doubling up" of aggravating circumstances, notwithstanding that there were two mitigating circumstances. Nevertheless, we have been cited to no decision

of the Florida Supreme Court where the harmless error rule has been applied in a situation like Goode, 704 F.2d at 612, where there were substantial mitigating circumstances and the "trial judge placed significant, and perhaps decisive, reliance upon" an improper nonstatutory aggravating circumstance.

The case at bar differs from Goode in a subtle, yet significant manner. Unlike Goode, the instant case involves the existence of only a single and insubstantial mitigating circumstance, i.e., age. Witt's appeal therefore raises issues at the intersection of the holding in Miller and the "can know" standard for courts reviewing death sentences set forth in Elledge, as applied by the Florida Supreme Court in Brown. Miller would seem to mandate that Witt's sentence cannot stand because the trial judge impermissibly relied

upon the recurrence factor, yet Brown suggests that a reviewing court facing these same facts "can know" that the sentencing result would not have differed even absent an impermissible factor. While there is no doubt that the sentencing judge relied heavily upon an aggravating factor which the state procedures themselves forbid in imposing the death penalty upon Witt, it is not entirely apparent that all other defendants in Florida would have been entitled to resentencing under these circumstances, because of the existence of only a single and insubstantial mitigating circumstance, i.e., age. Consequently, it is also not entirely apparent that the concerns expressed in Goode over arbitrary and freakish excutions should be invoked in Witt's case.

See Gregg v. Georgia, 428 U.S. 153, 188 - 89, 96 S.Ct. 2909, 2932, 49 L.Ed.2d 859 (1976).

Accordingly, we find that Barclay does not necessarily mandate a federal court's affirmance of the constitutionality of Florida's harmless error rule in all circumstances, as made clear by the continuing validity of the analysis of this Circuit in Goode. Nevertheless, we believe Witt's claims are properly encompassed within Barclay's affirmance of Florida's procedures. Indeed, the concurrence in Barclay suggests that the reasoning of that opinion extends to the Florida Supreme Court's handling of the Brown case. See _ U.S. at __ n. 12, 103 S.Ct. at 3432 n. 12 (Stevens, J., Concurring, joined by Powell, J.). This is a case, unlike Goode, where the Florida

Supreme Court justifiably applied a harmless error rule under the appropriate precedent to affirm a sentence despite the existence of nonstatutory aggravating factors. We therefore deny petitioner's claim on this issue.

VI. THE WITHERSPOON ISSUE--PROPRIETY OF PROSPECTIVE JURORS' EXCUSAL FOR CAUSE

[6] During the jury selection at petitioner's trial, the court excused 11 venirepersons for cause because they expressed opposition to the death penalty. Petitioner urges that three of these dismissals were unconstitutional under the standards set forth by the Supreme Court in Witherspoon v. Illinois, 391 U.S. 510, 88 S.Ct. 1770, 20 L.Ed.2d 776 (1968).[7]

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[7] The Witherspoon standards are applied to bifurcated death penalty trials of the type in this action in Adams v. Texas, 448 U.S. 38, 100 S.Ct. 2521, 65 L.Ed.2d 581 (1980).

In Witherspoon, the Supreme Court acknowledged that a capital defendant's right to an impartial jury under the Sixth and Fourteenth Amendments is jeopardized by the removal of jurors who merely express their distaste for or philosophical opposition to the death penalty. A jury constituted of only those remaining after such excusals would be a jury "uncommonly willing to condemn a man to die." Witherspoon, 391 U.S. at 521, 88 S.Ct. at 1776. Yet the Court recognized the necessity of excusing for cause those prospective jurors who, because of their lack of impartiality from holding unusually strong views against the death penalty, would frustrate a state's legitimate effort to administer an otherwise constitutionally valid death penalty scheme. The Court resolved these conflicting principles by

permitting a state to:

> execute a defendant sentenced to death by a jury from which the only veniremen who were in fact excluded for cause were those who made unmistakeably clear (1) that they would automatically vote against the imposition of capital punishment without regard to any evidence that might be developed at the trial of the case before them, or (2) that their attitude toward the death penalty would prevent them from making an impartial decision as to the defendant's guilt.

Witherspoon, 391 U.S. at 522, n. 21, 88 S.Ct. at 1777, n. 21 (emphasis in original).

The Court, in explaining this test, has indicated a prospective juror must be permitted great leeway in expressing opposition to the death penalty before he or she qualifies for dismissal for cause. A prospective juror may even concede that his or her feelings about the death penalty would possibly color an objective determination of the facts of a case

without admitting of the necessary partiality to justify excusal. The Court has stated:

> Nor [does] the Constitution permit the exclusion of jurors from the penalty phase of a . . . murder trial if they aver that they will honestly find the facts and answer the questions in the affirmative if they are convinced, beyond reasonable doubt, but not otherwise, yet who frankly concede that the prospects of the death penalty may affect what their honest judgment of the facts will be or what they may deem to be reasonable doubt. Such assessments and judgments by jurors are inherent in the jury system, and to exclude all jurors who would be in the slightest way affected by the prospect of the death penalty or by their views about such a penalty would be to deprive the defendant of the impartial jury to which he or she is entitled under the law.

Adams, 448 U.S. at 50, 100 S.Ct. at 2529 (emphasis added).

In the instant action, petitioner challenges the excusal of venirepersons Colby, Gehm, and Miller as unjustified

under the Witherspoon standard. The relevant portions of the voir dire of these jurors indicate that the inquiry of prospective juror Colby arguably adduced the least certain statement of inability to follow the law as instructed. Because we are compelled to reverse petitioner's sentence, if we find a Witherspoon violation with respect to a single prospective juror,[8] we shall limit our consideration to the dismissal of Ms. Colby, the most persuasive instance of a Witherspoon violation of the three excusals cited by petitioner.[9]

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8 Davis v. Georgia, 429 U.S. 122, 123, 97 S.Ct. 399, 400, 50 L.Ed.2d 339 (1976).

9 Prospective juror Gehm engaged in the following colloquy on voir dire:

> MR. PLOWMAN: I am asking you [to] consider . . . aggravating circumstances . . . would you be able to follow that and come

The following voir dire led to prospective juror Colby's dismissal:

> Mr. Plowman [for the State]: Now let me ask you a question, ma'am. Do you have any religious beliefs or personal beliefs against the death penalty?

> back with a death penalty conviction?
>
> * * *
>
> MR. GEHM: I am afraid not, sir.
> MR. PLOWMAN: You would not be able to do so?
> MR. GEHM: My religious convictions would be foremost in my mind up to this point and possibly beyond that.
> MR. PLOWMAN: Okay.
> MR. GEHM: I am afraid I would be unable to.
>
> * * *
>
> MR. BEHUNIAK [for petitioner]: I am saying if you were to return a verdict of guilty of first-degree murder, could you keep an open mind as to whether you should vote for the death penalty or life?
> MR. GEHM: No, I could not.
> MR. BEHUNIAK: Why is that, sir?
> MR. GEHM: I feel that the

> Ms. Colby: I am afraid personally but not--
>
> Mr. Plowman: Speak up, please.

> Almighty is the Judge of life or death.
> MR. BEHUNIAK: That's right. You said that previously. But you would not let it interfere with your determination?
> MR. GEHM: I am afraid that it would be weighing on my mind during the trial.
> MR. PLOWMAN: Your Honor, the state would move to dismiss for cause at this time.
> THE COURT: Do you think that this state of mind will prevent you from acting with impartiality? Do you feel that the state of mind that you have will prevent you from acting with impartiality? What I am saying is--
> MR GEHM: I am afraid it might, sir.
> THE COURT: You are afraid so?.
> MR. GEHM: I am afraid it might sir.
> THE COURT: Okay. Step down.

The Statement by venireperson Gehm, that he "could not" keep an open mind in sentencing, is far less equivocal than any responses proffered by Ms. Colby. Prospective juror Miller responded to questions on his views about the death penalty as follows:

Ms. Colby: I am afraid of being a little personal, but definitely not religious.

Mr. Plowman: Now, would that interfere with you sitting as a juror in this case?

MR. PLOWMAN: Okay. Did you hear the discussion that we have had just recently with Mrs. Davis regarding the death penalty?
MR. MILLER: That's right.
MR. PLOWMAN: Okay. Do you have any strong feelings one way or the other regarding the death penalty?
MR. MILLER: Well I just couldn't bring a--I couldn't vote, I guess, well, I am against the death penalty.
MR. PLOWMAN: You are against the death penalty? Would that interfere with your determination in this case?
MR. MILLER: I think it would.
MR. PLOWMAN: Okay. And you wouldn't be able to follow the law as instructed by the Court?
MR. MILLER: When it comes down to a death verdict, I wouldn't.
MR. PLOWMAN: You could not do it. Okay. Regardless of the law?
MR. MILLER: No, sir.
MR. PLOWMAN: Okay. Your Honor, the State would move the Court to excuse Mr. Miller for cause.

Ms. Colby: I am afraid it would.

Mr. Plowman: You are afraid it would?

Ms. Colby: Yes, sir.

Mr. Plowman: Would it interfere with judging the guilt or innocence of the defendant in this case?

THE COURT: Do you feel because of your state of mind regarding that particular situation it would make you unable to render a just and fair verdict in this case?
MR. MILLER: I am against the death verdict. I think it would.
THE COURT: Step down.

Prospective juror Miller as well offered less ambiguous responses then Ms. Colby and did not merely engage in a discussion of his feelings. He quite firmly indicated that he "wouldn't" be able to follow the law as instructed by the court and that he "could not" register a vote for the death penalty, "regardless of the law."

We therefore limit our consideration to the responses provided by prospective juror Colby and do not reach the question of the constitutionality of the for cause excusals of Gehm and Miller.

Ms. Colby: I think so.

Mr. Plowman: You think it would?

Ms. Colby: I think it would.

Mr. Plowman: Your Honor, I would move for cause at this point.

THE COURT: All right. Step down.

Prospective juror Colby's responses are limited to expressions of her feelings and her thoughts on the subject of inflicting the death penalty. At no point did she unequivocally state that she would automatically be unable to apply the death penalty or to find petitioner guilty if the facts so indicated. Her statements fall far short of the certainty required by Witherspoon to justify for cause excusal. Perhaps her responses are so devoid of the necessary certainty because of the State's failure to frame its questions

in an appropriately unambiguous manner. The State inquired whether Ms. Colby's fears about applying the death penalty would "interfere" with her sitting as a juror in petitioner's case without ever attempting to directly ask those questions the Witherspoon standard seems to require. The word "interfere" admits of a great variety of interpretations, and we would find it quite unnatural for a person, who has already expressed her concern about the death penalty, to respond otherwise than that her feelings would "interfere" with, "color," or "affect" her determinations. Such a response does not indicate an inability, in all cases, to apply the death sentence or to find the defendant guilty where such a finding could lead to capital punishment because it fails to reflect the profundity of any such "interference." We therefore find that

venireperson Colby was improperly excused for cause and that petitioner is entitled to be resentenced as a result of this violation of his constitutional rights.[10]

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10 Appellees urge us to dismiss petitioner's claim on procedural grounds. The state argues that Witt waived his right to bring this claim in federal habeas court, under Sykes, by failing to object at trial. Appellees invite our attention to Paramore v. State, 229 So.2d 855 (Fla. 1969), vacated on other grounds, 408 U.S. 935, 92 S.Ct. 2857, 33 L.Ed.2d 751 (1972), which they claim establishes a state rule requiring a defendant to indicate his or her desire to keep a challenged juror and to attempt to "qualify" that juror during the voir dire.

The Sykes procedural bar is inapplicable to petitioner's claim because the fact that the Florida Supreme Court on direct appeal considered appellant's Witherspoon claim on the merits, Witt v. State, 342 So.2d at 499, establishes the absence of a state contemporaneous objection rule prohibiting consideration of the propriety of a juror's excusal for cause where an objection was not registered during the trial proceedings. See Henry v. Wainwright, 686 F.2d 311, 313 (5th Cir. Unit B) ("If Florida law dealt with the merits of Henry's objection, whether or not there was a procedural default at trial under state law, then a federal

The reveral of petitioner's sentence on the basis of venireperson Colby's excusal is mandated by two cases from this Circuit of notable factual similarity. In Granviel v. Estelle, 655 F.2d 673 (5th Cir. 1981), the Court evaluated a voir dire in which the prospective juror was asked if he could ever vote to inflict the death penalty. He replied, "No, I don't think I

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habeas court must also determine the merits of the claim. Lefkowitz v. Newsome, 420 U.S. 283, 292 n. 9, 95 S.Ct. 886, 891 n.9, 43 L.Ed.2d 196 (1975); Ratcliff v. Estelle, 597 F.2d 474, 478 (5th Cir.), cert. denied, 444 U.S. 868, 100 S.Ct. 143, 62 L.Ed.2d 93 (1979)."), petition for cert. filed, No. 82-840 (Nov. 17, 1982); Moran v. Estelle, 607 F.2d 1140 (5th Cir. 1979). Also see County Court of Ulster County v. Allen, 442 U.S. 140, 154, 99 S.Ct. 2213, 2223, 60 L.Ed.2d 777 (1979) (when the state courts do not indicate that a "federal constitutional claim is barred by some state procedural rule, a federal court implies no disrespect for the State by entertaining the claim."); Booker v. Wainwright, 703 F.2d 1251 (11th Cir. 1983).

could." Then, in response to the question, "You just don't feel like you would be entitled to take another person's life in that fashion?" He nodded and then said, "No, I could not." The Court found that, "[t]hese questions and answers fall far short of an affirmation by [the prospective juror] that he would automatically vote against the death penalty regardless of the evidence, or that his objections to capital punishment would prevent him from making an impartial decision as to guilt." 655 F.2d at 677. Similarly, in Burns v. Estelle, 626 F.2d 396 (1980), the former Fifth Circuit en banc found that the Witherspoon test was not met where a prospective juror merely acknowledged that the presence of the death penalty would "affect" her deliberations. These cases turn on facts substantially similar to both types of answers provided

by Ms. Colby: first, where she expressed her thoughts and feelings about imposing the death penalty; and second, where she admitted that these reservations would impose some level of "interference" with her role as an impartial juror. These cases control our decision that the trial judge erred in excusing Colby for cause.[11]

The State forwards three substantive arguments counseling against a finding of a constitutional violation on these facts. First, appellees claim that any improper

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[11] The current uncertainty in our Circuit over the degree of deference under 28 U.S.C. §2254(d) to be accorded to a trial court's finding of cause, see Darden v. Wainwright, 699 F.2d 1031 (11th Cir. 1983), vacated on reh. en banc, at 1043 (April 6, 1983); Hance v. Zant, 696 F.2d 940 (11th Cir., Jan. 24, 1983) is immaterial to our disposition of appellant's claim. We are convinced that the trial court erred in finding cause for excusal in this instance under even the least rigorous standard of appellate review.

excusal was harmless error because the State used only two of its 10 available peremptory challenges. The State suggests it would have challenged juror Colby even if the court failed to remove her for cause. Appellees attempt to distinguish the panel opinion in Burns v. Estelle, 592 F.2d 1297 (5th Cir. 1979), on the facts. In Burns, the Court refused to find harmless error where the State has used 13 of 15 peremptory challenges and the petitioner challenged the excusal of four of the prospective jurors. Despite these differences in numbers, the State's argument that there is constitutional significance to the fact that some peremptory challenges remained after the jury was selected must fail under the holding of Davis v. Georgia, 429 U.S. 122, 123, 97 S.Ct. 399, 400, 50 L.Ed.2d 339 (1976) (per curiam)

(the improper exclusion of even one out of 83 veniremembers was grounds for reversal of a death sentence). Hance v. Zant, 696 F.2d at 956.

The State's second argument is that the Granviel case, upon which we rely, is factually distinguishable because the venireperson there was asked only about his inability to sentence to death, whereas here the prospective juror was also asked about the effect of her conscientious scruples upon her ability to determine impartially petitioner's guilt or innocence. This argument is unpersuasive because the court's decision in Granviel turned upon the ambiguity of the venireperson's answers, which were virtually identical to those in this case, and not upon the failure to inquire about the effect of his views on the guilt phase of the trial.

Appellees finally urge that this Court avoid imposing the de facto requirement that prosecutors ask each prospective juror certain standard questions and receive "talismanic" answers before excusal for cause may be justified. Appellees also argue that we should refrain from following the Granviel case to the extent that it imposes a per se rule that a prospective juror's use of the term "I think," even when taken out of context, constitutes inadequate grounds for excusal. We agree that no such rule exists in this Circuit. In our reading of Granviel, we find no indication that the Court considered the prospective juror's use of the phrase "I think" as anything but a part of the total circumstances of the voir dire, although a justifiably important part. The decision in this appeal likewise

countenances a review of the totality of the circumstances of the voir dire and does not require that the venireperson utter a pat phrase, the incantation of which magically frees the power of excusal from its yoke of unconstitutionality.

VII. CONCLUSION

We therefore affirm the district court's decision with respect to the first three issues evaluated on this appeal and vacate its decision on the fourth issue. We reverse the district court's decision on the Witherspoon issue and remand to that court for further proceedings not inconsistent with this opinion.

AFFIRMED IN PART, VACATED IN PART, REVERSED IN PART, and REMANDED.

RONEY, Circuit Judge, specially concurring.

Since I am not prepared to agree that this Court's decision in Goode v. Wainwright, 704 F.2d 593 (11th Cir. 1983) retains its viability in light of Stephens v. Zant, __ U.S. __, 103 S.Ct. 2733, 77 L.Ed.2d 235 (1983), and Barclay v. Florida, __ U.S. __, 103 S.Ct. 3418, 77 L.Ed.2d __ (1983), I concur only in the result reached by the Court. Since this case is distinguishable from Goode, it matters not to this decision how these Supreme Court decisions may have detracted from the Goode analysis.

Although I doubt the soundness of the analysis which leads to the reversal under Witherspoon v. Illinois, 391 U.S. 510, 88 S.Ct. 1770, 20 L.Ed.2d 776 (1968), I recognize the Court's attempt to faithfully follow the decisions in this Circuit which, although questionable, guide that

analysis and I therefore do not dissent.

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 81-5750

JOHNNY PAUL WITT,

Petitioner,

v.

LOUIE L. WAINWRIGHT,
ETC. ET AL.,

Respondents.

Appeal from the United States District
Court for the Middle District
of Florida

ON PETITION FOR REHEARING AND
PETITION FOR REHEARING EN BANC

(Opinion September 16, 1983, 11th Cir.,
1983, 714 F.2d 1069)

(January 4, 1984)

Before RONEY and KRAVITCH, Circuit Judges,
and TUTTLE, Senior Circuit Judge.

PER CURIAM:

Since the publication of this opinion, the Supreme Court has decided Wainwright v. Goode, 52 L.W. 3419. Its opinion there invalidates the decision contained in Section V of our opinion. Therefore, the opinion is modified by striking all of Part V and substituting the following in lieu thereof:

V. CONSIDERATION OF NON-STATUTORY AGGRAVATING CIRCUMSTANCES

> This issue has now been decided adversely to Witt by the Supreme Court in Wainwright v. Goode, 52 L.W. 3419.

The opinion is further modified by striking the second full paragraph on page 4808 of the slip opinion and substituting the following paragraph therefore:

> The State's second argument is that the Granviel case, upon which we rely is factually distinguishable because the venireperson there was asked only about his inability to sentence to death, whereas here the prospective juror was also asked

about the effect of her conscientious scruples upon her ability to determine impartially petitioner's guilt or innocence. This argument is unpersuasive because, while we are bound by Granviel as to the first prong of the inquiry, Burns controls our determination as to the second - that is whether Mrs. Colby's beliefs would "prevent" her "from making an impartial decision as to the defendant's guilt." Witherspoon, 391 U.S. at 522 n. 21, 88 S.Ct. at 1777 n. 21 (emphasis in original). As discussed above, Mrs. Colby's "thinking" her belief would "interfere with judging guilt or innocence" does not change the posture of the case in favor of the disqualification. Burns v. Estelle, supra at 398.

The Petition for Rehearing is DENIED. No member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc, (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 26), the Suggestion for Rehearing En Banc is DENIED.

Judge Roney would grant rehearing to reconsider the Witherspoon issue in light of the en banc opinion in McCorquodale v. Balkcom, __ F.2d __ (11th Cir., Dec. 30, 1983)(en banc)[No. 82-8011, Slip Op. ___].

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

JOHNNY PAUL WITT,

Petitioner,

v. Case No. 80-545-CIV-T-GC

LOUIE L. WAINWRIGHT, Secretary, Florida Department of Corrections, and JIM SMITH, Attorney General, State of Florida,

Respondent.

MEMORANDUM OPINION AND ORDER

I.

On February 20, 1974, Petitioner Johnny Paul Witt was found guilty of first degree murder by a Volusia County, Florida, Circuit Court jury. Pursuant to the Florida capital sentencing statute[1] the trial judge sentenced Petitioner to death on February 21, 1974. The Supreme Court

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[1] Fla. Stat. §921.141 (1973).

of Florida subsequently affirmed the conviction and death sentence, Witt v. State, 342 So.2d 497 (Fla. 1977), and the United States Supreme Court denied a petition for certiorari, Witt v. Florida, 434 U.S. 935 (1977), reh. denied, 434 U.S. 1026 (1978). A motion for stay of execution and a petition for writ of habeas corpus asserting eight grounds for relief (grounds 12A - H) were filed on May 5, 1980. Prior to this Court's ruling on the former, the Supreme Court of Florida stayed Petitioner's execution pending its review of his motion for postconviction relief. The Florida Supreme Court affirmed the denial of Petitioner's postconviction relief motion and vacated the stay of execution on July 24, 1980; thereafter, the Supreme Court of the United States denied a petition for writ of certiorari. Witt

v. Florida, __ U.S. __, 101 S.Ct. 796 (1981). An amended petition adding a ninth ground (121) was filed March 3, 1981. On April 23, 1981, the Court received evidence and heard oral argument on the eight issues raised in the original petition.[2] Those issues shall be analyzed in the order in which they appear in the original and amended petitions.[3]

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2 The Court heard oral argument on Respondent's Motion to Dismiss the ninth ground on April 3, 1981. Because Respondent's motion has been granted in a separate opinion and order, ground 121 is not addressed here.

3 More detailed analyses of the facts underlying Petitioner's claims are set forth as necessary in the context of the specific issues to which they pertain. For a general statement of the circumstances surrounding the crime for which the Petitioner was convicted, see Witt v. State, supra at 499.

II.
A. THE ROLE OF NONSTATUTORY AGGRAVATING CIRCUMSTANCES IN THE SENTENCING CALCULUS

Grounds 12A and B of the petition set forth Petitioner's contention that his sentence of death is violative of the Eighth Amendment prohibition against cruel and unusual punishment, made applicable to the states via the Fourteenth Amendment as well as the Fourteenth Amendment's due process and equal protection clauses because (1) the sentence was based in part on nonstatutory or improper aggravating circumstances and (2) the judge and jury heard evidence of these circumstances during the sentencing phase of the bifurcated trial. Because these claims are inextricably intertwined, they are treated jointly.

1. GROUND 12A

Imposition of the death penalty by

the states is not unconstitutional per se, so long as it is done pursuant to properly drawn statutes which guide discretion and eliminate the arbitrariness and capriciousness condemned by the Supreme Court in Furman v. Georgia, 408 U.S. 238 (1972). Spinkellink v. Wainwright, 578 F.2d 582 (5th Cir. 1978). Florida's capital sentencing procedure, which provides for examination of aggravating and mitigating circumstances prior to imposition of sentence and automatic review of death sentences by the Florida Supreme Court, was found constitutional on its face in Proffitt v. Florida, 428 U.S. 242 (1976).

The Petitioner contends that the trial court applied Fla. Stat. §921.141 (1973)[4] unconstitutionally in this

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[4] The Florida capital sentencing statute was amended in 1974, 1977 and 1979.

case because in fixing the sentence it relied in part on nonstatutory aggravating circumstances (premeditation and propensity to commit further violent crimes) and incorrectly found applicable the statutory aggravating circumstance of creation of a great risk of death to many persons, §921.141(5)(c). The cornerstone of Petitioner's argument is Ellege v. State, 346 So.2d 998 (Fla. 1977), cited for the proposition that where a death sentence is based in part on nonstatutory or improper aggravating circumstance is also present, the sentence must be reversed.

There is no doubt that at the time of Petitioner's setencing, Fla. Stat. §921.141(5) included neither propensity nor premeditation as a proper aggravating circumstance. It is also true that where, as here, only one person other than the

accused and his victim were present at the murder scene, the statutory factor of great risk of death to many persons under §921.141(5)(c) cannot properly be found. Kampff v. State, 371 So.2d 1007, 1009 (Fla. 1979). The trial court's inclusion of the above factors in its "Findings of Facts in Support of the Death Penalty"[5] was therefore technically improper. Contrary to the position of Petitioner, however, it does not automatically follow that in every instance in which a trial court's findings include nonstatutory or improper aggravating circumstances coupled with a mitigating circumstance the capital sentencing statute has been unconstitutionally applied. The key difficulty in

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5 The trial court's sentencing Order is set forth in full as an appendix to this Opinion.

Ellege was the fact that it was implicit in the trial court's sentencing order that mitigating circumstances existed, but the specific findings of fact failed to identify them so that it was impossible to know what factors the court had weighed in arriving at its decision. 346 So.2d at 1003. In the instant case, however, the trial court's sentencing order specifically identifies Petitioner's age as the sole mitigating circumstance and includes two proper statutory aggravating circumstances -- the fact that the murder was committed in the course of a kidnapping, and the fact that it was committed in an especially heinous, atrocious or cruel fashion. §921.141(5)(d) and (h). Thus, this case is dissimilar to Ellege and is controlled instead by Brown v. State, 381 So.2d 690 (Fla. 1980). In a fact pattern strikingly

similar to Petitioner's, the Brown trial court considered improper aggravating circumstances (including misapplication of factor 5(c), great risk of death) and identified a single mitigating circumstance, age. The Supreme Court of Florida concluded that Ellege did not compel reversal, reasoning that

> unlike Ellege, here "we can know" that the result of the weighing process would not have been different had the impermissible factors not been present. 346 So.2d at 1003. The trial judge has told us in his order that the appellant's age, 22 at the time of the offense and 23 years at the time of the trial, had only "some minor significance." When this tenuous factor is juxtaposed against at least two well-founded aggravating circumstances it is beyond reason to conclude that the trial judge's decision to impose the death penalty would have been affected by the elimination of the unauthorized aggravating circumstances. This case then is dissimilar to Ellege, but like Hargrave v. State, 366

> So.2d 1 (Fla. 1978), where the doubling up of aggravating circumstances was not fatal to the imposition of a death sentence even in light of the existence of two mitigating circumstances. Here, as there, ample other statutory aggravating circumstances exist to convince us that the weighing process has not been compromised. Given the imprecision of the criteria set forth in our capital punishment statute we must test for reasoned judgment in the sentencing process rather than a mechanical tabulation to arrive at a net sum.

Brown, supra at 696. The fact that the trial judge in Petitioner's case did not, unlike the trial judge in Brown, elaborate on the weight assigned the age factor is not telling: The Florida Supreme Court has repeatedly found age per se an insignificant mitigating factor. See Holmes v. State, 374 So.2d 944 (Fla. 1979); Washington v. State, 362 So.2d 658 (Fla. 1978); Alvord v. State, 322 So.2d 533 (Fla. 1975); Songer v. State, 322 So.2d

481 (Fla. 1975); Sullivan v. State, 303 So.2d 632 (Fla. 1974). Indeed, in its affirmance of his conviction and sentence on direct appeal, the Supreme Court of Florida stated that Petitioner's age was a factor contributing to his dominance of his codefendant such that his death sentence was justified even though Petitioner's codefendant was sentenced to life imprisonment. Witt v. State, supra at 500 - 501. Therefore, viewing the sentencing phase of Petitioner's trial in the "totality of the circumstances present", Ellege, supra at 1003; State v. Dixon, 283 So.2d 1, 10 (Fla. 1973), the Court finds that the sentencing authority's discretion was properly guided by Fla. Stat. §921.141, and that imposition of the death sentence was not rendered cruel and unusual, nor violative of the due process and equal

protection clauses by virtue of the trial court's inclusion of nonstatutory and improper aggravating circumstances in its sentencing order.[6]

2. GROUND 12B

Because the trial court's recitation of nonstatutory and improper aggravating circumstances in its sentencing order was not an unconstitutional application of the Florida capital sentencing statute, it

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[6] The Court is unpersuaded by Petitioner's reliance on the federal district court's decision in Henry v. Wainwright, No. 79-584-Orl-Civ-R (M.D. Fla., February 14, 1980). In that case the court held, based on Ellege and Dixon, that where the state trial court's instruction failed to limit the jury's consideration to the statutory aggravating circumstances listed in §921.141(5), a new sentencing hearing was required. Henry does not discuss the more recent Brown case, and based on the close proximity in time of decision (Brown January 31, 1980; Henry, February 14, 1980), there is a high likelihood that the federal court did not have the benefit of Brown in reaching its decision.

follows a fortiori that the fact that the judge and jury heard evidence of these circumstances during the penalty phase of the trial is insignificant. Nevertheless, Petitioner's argument that it was improper for the fact finder to have received evidence concerning injuries occurring after the death of the victim in considering aggravating factor 5(h) (capital felony was especially heinous, atrocious, or cruel) merits further discussion.

Petitioner's argument is founded on Halliwell v. State, 323 So.2d 557 (Fla. 1975), which held that the infliction of post death injuries many hours after completion of a murder is not relevant to factor 5(h), while the infliction of such injuries prior to death or instantly thereafter is relevant. Halliwell, therefore, does not exclude from

consideration during the sentencing portion of trial all evidence of post death mutilation; instead, it merely discards that evidence so temporally distant from the actual completion of the murder that it is irrelevant to circumstance 5(h). The evidence in Petitioner's case indicates that the mutilation and dismemberment of the victim occurred closer in time to the murder than the post death injuries in Halliwell. (R 901, 974 - 980)[7] More importantly, in those Florida decisions that have considered this issue and held improper the introduction of such evidence, the post death injuries were generally inflicted to facilitate concealment or disposal of the corpse; in Petitioner's case, however, the injuries were

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[7] Record references are to the record on appeal.

apparently inflicted for the gratification, sexual and otherwise, of the Petitioner and his codefendant. It is the Court's view that in this circumstance the mutilation and dismemberment of the victim's corpse is relevant to the issue of whether the murder was especially heinous, atrocious or cruel, and the receipt of that evidence was therefore within the bounds of Fla. Stat. §921.141(5)(h). Ground 12B of the amended petition is therefore without merit.

B. PSYCHIATRIC TESTIMONY AND THE SELF INCRIMINATION PRIVILEGE

Dr. Arturo Gonzalez, a court-appointed psychiatrist, examined Petitioner prior to trial to determine both his competency to stand trial and his sanity at the time of the offense. During the sentencing phase of trial, Dr. Gonzalez testified as to the "efficient manner" in which the

murder was committed (R 1132, 1135)[8] and the Petitioner's propensity to commit violent criminal acts. Because the trial court's sentencing order included propensity and premeditation as aggravating circumstances, Petitioner argues (in ground 12C of the amended petition) that use of his statements to Dr. Gonzalez and the conclusions based on them violated his privilege against self-incrimination. This contention is based entirely on the Fifth Circuit's recent decision in Smith v.

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[8] Petitioner contends in his evidentiary hearing brief that Dr. Gonzalez testified that the crime was performed in a "cunning and efficient" manner (emphasis added). Careful review of the trial transcript, however, reveals that while the state incorporated the word "cunning" into its questions and its characterizations of testimony, Dr. Gonzalez neither used the term nor adopted it inferentially. (R 1131 - 1132; 1134 - 1135). Dr. Daniel Sprehe, however, did describe the Petitioner's actions as "cunning". (R 1172)

in Smith, the trial judge was required to impose a death sentence if the jury answered three statutory questions in the affirmative, the second question going to the defendant's propensity to commit further violent, criminal acts. In Smith, the trial court ordered a psychiatric examination of its own volition without notice to defense counsel; introduction of the psychiatrist's testimony totally surprised the defense attorneys, giving them "no chance to prepare a response to [the] testimony, or to impeach it in any significant way." 602 F.2d at 696 - 701. The Court accordingly held that a defendant may not be compelled to speak to a psychiatrist who can use his statements against him at the sentencing phase of a capital trial. Id. at 708.

By contrast to the Texas statute in

Estelle, 602 F.2d 694 (5th Cir. 1979), cert. granted 455 U.S. 926 (1980).

Petitioner's ground 12C is meritless. Since consideration of improper and non-statutory aggravating circumstances in this case did not unconstitutionally imbalance the weighing process and the trial court's sentencing decision would have been the same "had the impermissible factors not been present," Brown, supra at 696, Dr. Gonzales' testimony is not of constitutional consequence.[9] Additionally, Smith is inapposite to the facts at hand. Under the Texas statute involved

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9 The same reasoning precludes Petitioner from availing himself of the "cause and prejudice" exception to the rule of Wainwright v. Sykes, 433 U.S. 72 (1977), to excuse his failure to interpose a contemporaneous objection to Dr. Gonzales' testimony: Given the totality of the circumstances, Petitioner was not "prejudiced" by the evidence of propensity and premeditation.

Smith, the statute in issue here did not include propensity as a proper aggravating factor; indeed, as Petitioner points out in grounds 12A and B, it was technically improper for that circumstance to have been considered. Moreover, in Florida the ultimate sentencing decision is the product of balancing aggravating and mitigating circumstances rather than a mechanical counting of responses to statutory questions as under the Texas scheme. See Dixon, supra at 10. More importantly, the linchpin of Smith was the defense's "manifest surprise" by the "devasting" psychiatric testimony. 402 F.2d at 696 - 699. In contrast, Petitioner's trial counsel was not surprised by the psychiatric testimony, and his failure to object to it was motivated at least in part by tactical considerations, as his deposition

testimony reveals. Deposition of Peter B. Behuniak, pp. 11, 28, 29, 34. Therefore, because Dr. Gonzalez' testimony was not prejudicial to Petitioner, and because the rationale of Smith is inapplicable, Petitioner's ground 12C is rejected.

C. SUFFICIENCY OF THE TRIAL JUDGE'S FINDINGS AS TO AGGRAVATING AND MITIGATING CIRCUMSTANCES

In ground 12D of his amended petition, Petitioner contends that the trial judge's sentencing order fails to divulge the facts upon which it is based, violating his right to adequate appellate review.

Florida law does not require that the trial court's order regarding mitigating and aggravating circumstances follow any particular form. Holmes v. State, 374 So.2d 944, 950 (Fla. 1979). Rather, "[i]t must appear that the sentence imposed was

the result of reasoned judgment." Id. That the sentencing decision here was the result of reasoned judgment is amptly supported by the record, and the court's failure to set forth its findings with greater particularity does not contravene the Eighth Amendment or the Fourteenth Amendment.

D. DISPROOF BEYOND A REASONABLE DOUBT OF THE MITIGATING FACTOR OF MENTAL OR EMOTIONAL DISTURBANCE

Petitioner next argues (under ground 12E of his amended petition) that, based upon the psychiatric evidence presented at the sentencing phase of trial, he was suffering from a mental or emotional disturbance at the time of the murder, a mitigating factor under the Florida statute. Fla. Stat. §921.141(6)(b). It is contended that the state failed to negate this circumstance beyond a reasonable doubt,

that the trial court erroneously rejected Petitioner's proof of this circumstance, and that the death sentence is therefore unreliable and arbitrary in violation of the Eighth and Fourteenth Amendments.

Petitioner's position is predicated on his two-fold presumption that (1) the trial court did not find (or could not have found) the mitigating circumstances of mental or emotional disturbance negated beyond a reasonable doubt, and (2) reasonable doubt is the standard of proof the trial court was required to employ in evaluating statutory aggravating and mitigating circumstances. As to the first presumption, the mere fact that the state trial court did not find mental or emotional disturbance a mitigating circumstance does not compel this Court to conclude that a standard less stringent

than "beyond a reasonable doubt" was employed. The trial court's determination that circumstance 6(b) did not apply is buttressed by expert testimony that at the time of the crime the Petitioner was in full possession of his mental faculties, suffering from neither psychosis nor neurosis. (R 1128, 1172, 1174). This court is therefore unwilling to upset the presumptively correct factual determination of the state trail court. Sumner v. Mata, __ U.S. __, 101 S.Ct. 764 (1981).

Finally, while it is incumbent upon the prosecution in a criminal case to prove beyond a reasonable doubt every fact necessary to constitute the crime charged, In re Winship, 397 U.S. 358, 368 (1970), it does not automatically follow that during the sentencing phase of a capital trial in Florida the existence of all

possible mitigating circumstances must be disproven by the same standard. In Mullaney v. Wilbur, 421 U.S. 684 (1975), relied upon by the Petitioner, the Supreme Court struck down the Maine rule requiring a homicide defendant to prove that he acted in the heat of passion on sudden provocation by a preponderance of the evidence to reduce murder to manslaughter, holding that it was incumbent upon the prosecution to show the absence of passion beyond a reasonable doubt. Mullaney, however, addressed the proof standard for an essential element of the offense of murder and not, as here, the standard of proof for a statutory mitigating circumstance during the sentencing phase of a capital trial after the issue of guilt has been resolved. Mullaney does not stand for the proposition that the prosecution must prove

beyond a reasonable doubt any fact affecting the blameworthiness of an act or the severity of punishment authorized for its commission, and the Supreme Court so ruled in Patterson v. New York, 432 U.S. 197 (1977).

Patterson upheld the New York rule requiring the defendant in a second degree murder prosecution to prove by a preponderance of the evidence the affirmative defense of extreme emotional disturbance to reduce the crime to manslaughter. 432 U.S. at 214 - 215. The instant case, involving proof of the mitigating circumstance of mental or emotional disturbance, is more akin to proof of the affirmative defense of extreme emotional disturbance in Patterson than proof of an element of the offense itself in Mullaney; hence, the rationale of the former controls.

Therefore, because (1) it has not been shown that the trial judge employed a proof standard less stringent than beyond a reasonable doubt in rejecting Petitioner's evidence as to mitigating circumstance 6(b), and (2) Petitioner has failed to demonstrate that in this context beyond a reasonable doubt is the requisite standard, ground 12E of the amended petition is untenable.

E. INTENT REQUIRED FOR IMPOSITION OF THE DEATH PENALTY

In ground 12F of the amended petition, Petitioner argues that the Eighth and Fourteenth Amendments to the Constitution prohibit imposition of the death penalty where a Defendant does not possess a specific intent to cause the death of the victim, and that the evidence in this case shows that Petitioner lacked that intent. Petitioner's argument is based primarily

on the concurring opinion of Justice White in Lockett v. Ohio, 438 U.S. 586, 621 (1978) and language extracted from Coker v. Georgia, 433 U.S. 584 (1977) and Furman v. Georgia, 408 U.S. 238 (1972).

The opinions cited do not stand squarely for the proposition asserted; namely, that the state must prove the Defendant's specific intent to kill before a death sentence can be imposed. In Lockett, the Supreme Court discussed the propriety of the death penalty in a multi-defendant felony-murder situation. Justice White's conclusion that "it violates the Eighth Amendment to impose the penalty of death without a finding that the defendant possesses a purpose to cause the death of the victim," 438 U.S. at 624, was not adopted by the full court. Indeed, the Lockett majority specifically declined

ruling on the defendant's contention that the death penalty is constitutionally disproportionate for one who has not been proven to have intended to take life. 438 U.S. at 608 n. 16.

Alternatively, assuming that the Petitioner is correct and that specific intent to cause the victim's death must be shown, the record adequately illustrates that Petitioner in fact had that intent, as the following trial testimony illustrates:

> Q. Deputy Barnadale, did you have occasion to ask the Defendant, Johnny Paul Witt, why he was in the area near the 7-Eleven Store, on North Dale Mabry on October 18, 1973?
>
> A. Yes, I did. He stated to me that they had gone there to kill somebody.
>
> (R 974)
>
> • • • •

Q. Deputy Barnsdale, what did he tell you?

A. He stated simply that they had gone out there to kill somebody, and I made it a point to ask him if he had gone out there for the purpose of killing Jonathan Kushner? And he at that time made a comparison between killing human beings and hunting animals.

Q. Did he specifically tell you that he was there to kill?

A. He said that he was there to kill a person, that he had not singled out Jonathan Kushner; and in his comparison, he said, "When you go rabbit hunting, you don't go to hunt a certain rabbit; you kill whatever comes by."

(R 975 - 976)

In the sentencing phase there was further testimony relating to the Petitioner's intent:

Q. Mr. Dickson, did he tell you whether or not they had made any preparations to carry out this intent to kill on the 29th of October, 1973?

A. Well, he told me that on

this particular day that they did kill the Kushner boy that they had prepared themselves by having some rope and a T-shirt and this star drill which they planned to use to kill this boy.

(R 1110)

Because the state is not required to prove that Petitioner specifically intended to take the victim's life for imposition of the death penalty, and because even under the rule urged in Justice White's Lockett concurrence, the record contains adequate evidence of specific intent to kill, ground 12F of the amended petition is meritless.

F. THE EXCLUSION OF JURORS AND WITHERSPOON V. ILLINOIS

Based on the principles established in Witherspoon v. Illinois, 391 U.S. 510 (1968) and its progeny, Petitioner argues in ground 12G of the amended petition that the exclusion of seven prospective jurors

from his panel violated the Sixth and Fourteenth Amendments.

Witherspoon held that "a sentence of death cannot be carried out if the jury that imposed or recommended it was chosen by excluding venireman for cause simply because they voiced general objections to the death penalty or expressed conscientious or religious scruples against its infliction." 391 U.S. at 522. Execution of a death sentence is not precluded, however, where excluded veniremen make it clear that their attitude towards the death penalty would prevent them from either making an impartial decision as to the defendant's guilt or imposing a sentence of death once guilt is established. Id., at 522 - 523, n. 21; Adams v. Texas, __ U.S. __, 100 S.Ct. 2521 (1980).

Respondent contends that consideration of the Witherspoon claim is barred due to the failure of Petitioner's trial counsel to contemporaneously object to the exclusion of the jurors at voir dire.[10] However, because the Florida Supreme Court considered the merits of this issue on Petitioner's direct appeal, Witt v. State, supra at 499, this Court is not precluded from considering it in the context of this habeas corpus proceeding. Moran v. Estelle, 607 F.2d 1140 (5th Cir. 1979).

Upon application of the rule of Witherspoon and its progeny to the voir dire of the seven excused jurors, this Court concludes that the exclusion of juror Evelyn Colby is the only case meriting

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[10] Petitioner's trial counsel objected only to the exclusion of prospective juror Kazmierczak.

discussion.[11] Colby was successfully challenged for cause on the basis of the following exchange:

> Q. (MR. PLOWMAN, prosecutor)
>
> Now, let me ask you a question, ma'am. Do you have any religious beliefs or personal beliefs against the death penalty?
>
> COLBY:
>
> I am afraid personally but not--
>
> MR. PLOWMAN:
>
> Speak up, please.
>
> COLBY:
>
> I am afraid of being a little personal, but definitely not religious.

---

[11] Review of the voir dire of the other six jurors immediately reveals that their exclusions were clearly justified under the Witherspoon precepts. See R 512, 580 (Kammerzell); R 514, 535 - 536 (Gehm); R 610 - 612 (Hill); R 591 - 592 (Davis); R 595 - 596 (Miller); and R 648 - 649 (Sherman).

MR. PLOWMAN:

Now, would that interfere with you sitting as a juror in this case?

COLBY:

I am afraid it would.

MR. PLOWMAN:

You are afraid it would?

COLBY:

Yes, Sir.

MR. PLOWMAN:

Would it interfere with judging the guilt or innocence of the Defendant in this case?

COLBY:

I think so.

MR. PLOWMAN:

You think so.

COLBY: I think it would.

MR: PLOWMAN:

Your Honor, I would move for cause at this point.

THE COURT:

All right. Step down.

MR. PLOWMAN:

Step down, ma'am.

(R 505 - 506)

The Petitioner contends that it is apparent from the foregoing that Colby's responses ("I am afraid . . . I think . . .") did not make it unmistakably clear that she would vote against the imposition of the death penalty or that her attitude towards the death penalty would prevent her from making an impartial decision as to his guilt. Petitioner argues that responses almost identical to those given by Colby were declared inadequate to justify exclusion of potential jurors in Maxwell v. Bishop, 398 U.S. 262 (1970). In Maxwell, the Supreme Court found a Witherspoon violation based on the following colloquies:

> Q. If you were convinced beyond a reasonable doubt at the end of this trial that the Defendant was guilty and that his actions had been so shocking that they would merit the death penalty do you have any conscientious scruples about capital punishment that might prevent you from returning such a verdict?
>
> A. I think I do.

Another venireman was removed from the jury panel on the basis of the following:

> Q. Do you entertain any conscientious scruples about imposing the death penalty?
>
> A. Yes, I am afraid I do.

398 U.S. at 264.

It is immediately apparent that while the responses of Colby resemble the responses of the prospective jurors in Maxwell, the questions eliciting them cannot be compared. Colby's statements read in their entirety clearly indicate that her personal beliefs against the death penalty would have prevented her from

making an impartial decision as to the Petitioner's guilt or innocence, which is sufficient to justify her exclusion under Witherspoon and Adams. Given that there exists no ironclad rule that responses to questions on voir dire incorporating the phrases "I think" or "I am afraid" necessarily involve Witherspoon defects,[12] and reading the responses of Colby in context, the Court concludes that her exclusion did not violate Petitioner's rights under the Sixth and Fourteenth Amendments. The state court's presumptively correct factual determination should accordingly stand. Sumner, supra.

G. ADMISSION OF PETITIONER'S ORAL AND WRITTEN CONFESSIONS

Finally, in his ground 12H Petitioner

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12 See, for example, Brown, supra at 694.

contends that his thirteen page handwritten confession and oral statements, obtained after his request to consult an attorney, were admitted into evidence at trial in violation of the Fifth, Sixth and Fourteenth Amendments. The trial court denied Petitioner's motion to suppress these statements, and on direct appeal the Florida Supreme Court ruled that the confession was voluntary and that Petitioner had waived his right to counsel. Witt v. State, supra at 499 - 500. Petitioner now argues that the state courts erred and that this Court may properly review the admissibility of the statements under 28

U.S.C. §2254(d)(6) and (7).[13]

The record and the opinion of the Supreme Court of Florida in Witt, supra at 499, reveal the following: After his arrest on November 5, 1973, Petitioner was fully advised of his rights and he requested counsel. (R 344 - 345, 364, 852). Questioning was halted and the Petitioner's request was communicated to the public defender's office by the sheriff's department. (R 364, 371). On November 6, 1973, Petitioner made his first appearance before a judicial officer with counsel

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[13] Under §2254(d), the findings of the state courts are accorded a presumption of correctness, unless one of eight enumerated statutory exceptions applies. Petitioner here contends that the presumption is overborne by (1) his failure to receive a full, fair and adequate hearing before the trial court and the Florida Supreme Court, §2254(d)(6), and (2) denial of due process in the state court proceedings, §2254(d)(7).

(R 372, 376), although he contends that he had no opportunity to consult counsel at the appearance. On November 7, 1973, while conversing casually for a few minutes with a detective in his cell, Petitioner indicated his desire to confess. (R 396 - 397, 872). Petitioner was taken from his cell to the sheriff's offices where he made both an oral and a handwritten confession. (R 399, 883). That the Petitioner was fully advised of his constitutional rights and had specifically rejected an offer to consult counsel (he had signed a waiver) is not in dispute.

Based on the foregoing, this Court is of the opinion that as to the issues raised here, the Petitioner received a full, fair and adequate hearing in the state proceedings which comported with the requirements of due process. The Court

finds further that the state courts' rulings were made pursuant to the appropriate legal standards and that the Petitioner has failed to provide convincing evidence that their factual determinations were erroneous. See Sumner, supra at 771; 28 U.S.C. §2254(d). Ground 12R of the amended petition for writ of habeas corpus is therefore rejected.

III.

Based on the foregoing analysis and the fact that Respondent's motion to dismiss count 12I of the amended petition has been granted, it is Ordered that the amended petition for writ of habeas corpus is DENIED.

DONE AND ORDERED in Chambers in Tampa, Florida this 14th day of May, 1981.

George C. Carr
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES COURT OF APPEAL
FOR THE ELEVENTH CIRCUIT

JOHNNY PAUL WITT,

Petitioner-Appellant,

v. CASE NO. 81-5750

LOUIE L. WAINWRIGHT,

Respondent-Appellee.

APPEAL FROM THE
UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF FLORIDA

PETITION FOR REHEARING
AND
SUGGESTION FOR REHEARING EN BANC

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I. CERTIFICATE OF INTERESTED PERSONS

Not applicable.

II. STATEMENT OF COUNSEL

I, Robert J. Landry, attorney for Appellee, express a belief based on reasoned and studied professional judgment that the panel decision involves the following questions of exceptional importance:

1. Whether a federal court of appeals on review of a denial of habeas corpus may ignore and reject factual findings made by the state courts and the federal district court that a venireperson made it unmistakably clear that her capital punishment views prevented her from being impartial as to the defendant's guilt or innocence.

2. Whether the panel decision has misapplied Witherspoon v. Illinois, 391 U.S. 510, 20 L.Ed. 2d 776 (1968) and Adams v. Texas, 448 U.S. 38, 65 L.Ed.2d 581 (1980) by requiring that the venireperson be "unable to find the petitioner guilty" rather than simply requiring that the

juror be able to make an impartial decision as to guilt or that the juror's performance of his duties would be substantially impaired.

III. STATEMENT OF THE CASE PROCEEDINGS AND DISPOSITION OF CASE

Appellant Witt was convicted in Florida of first degree murder and received a sentence of death. He exhausted his state court remedies and filed a petition for writ of habeas corpus. The district court denied relief. On appeal, a panel affirmed in part and reversed in part holding that the sentence of death was constitutionally infirm, that there had been a violation of Witherspoon v. Illinois, 391 U.S. 510, 20 L.Ed.2d 776 (1968).

IV. STATEMENT OF FACTS NECESSARY TO THE ARGUMENT

As indicated in the panel opinion, the following voir dire led to the excusal of prospective juror Colby's dismissal:

"Mr. Plowman [for the State]: Now, let me ask you a question, ma'am. Do you have any religious beliefs or personal beliefs against the death penalty?

Ms. Colby: I am afraid personally, but not - -

Mr. Plowman: Speak up, please.

Ms. Colby: I am afraid of being a little personal, but definitely not religious.

Mr. Plowman: How would that interfere with you sitting as a juror in this case?

Ms. Colby: I am afraid it would.

Mr. Plowman: You are afraid it would?

Ms. Colby: Yes, sir.

Mr. Plowman: Would it interfere with judging the guilt or innocence of the defendant in this case?

Ms. Colby: I think it so.

Mr. Plowman: You think it would?

Ms. Colby: I think it would.

Mr. Plowman: Your Honor, I would move for cause at this point.

The Court: All right. Step down."

(Slip opinion, p. 4806)

Defense counsel did not object to the excusal or seek to ask additional questions, although he did object to the excusal of another juror on Witherspoon grounds. The Florida Supreme Court on direct appeal and the federal district court made factual findings that Colby had clearly established that she would not be impartial on the question of guilt and innocence. The panel disagreed, finding that the use of the word interfere was too broad.

The panel, in addition to the Witherspoon ruling, concluded that Witt was not entitled to habeas relief where nonstatutory aggravating circumstances had been utilized, yet inexplicably vacated the

district court's rejection of Witt's claim on this issue. (Slip opinion, p. 4809).

V. ARGUMENTS AND AUTHORITIES

I.

In reversing the district court and granting habeas corpus relief for the alleged violation of Witherspoon v. Illinois, 391 U.S. 510, 20 L.Ed.2d 776 (1968), the panel decision has rejected without explanation the factual determination of the state courts that juror Colby had made it unmistakably clear that her capital views would prevent her from making an impartial decision as to the defendant's guilt. Witt v. State, 342 So.2d 497, at 499 (Fla. 1977). The United States Supreme Court has repeatedly held that such findings are to be accorded a high degree of deference and that a federal

court may not simply disagree with the state court before rejecting its factual determinations. Sumner v. Mata, 449 U.S. 539, 66 L.Ed.2d 722 (1981); Marshall v. Lonberger, __ U.S. __, 74 L.Ed.2d 646; Maggio v. Fulford, __ U.S. __, 76 L.Ed.2d 794.

In a mild understatement, the panel decision acknowledges, in footnote 11, uncertainty in the circuit over the degree of deference to findings of fact under 28 U.S.C. §2254. In Darden v. Wainwright, 699 F.2d 1031 (11th Cir. 1983), the court observed that trial judges were accorded broad discretion in evaluating juror impartiality and that the state court's factual findings are entitled to a presumption of correctness.[1] See also Judge

[1] In an en banc decision reported at 708 F.2d 646, the district court decision was affirmed. Recently this court granted rehearing.

Kravitch's dissent in McCorquodale v. Balcom, 705 F.2d 1553, at 1561.[2]

In light of the panel's failure to give proper effect to the state court's findings of fact and in light of Judge Roney's concurring opinion admitting doubt as to the soundness of the analysis leading to reversal as well as the correctness of prior circuit decisions (slip opinion at 4809), the court should grant rehearing or rehearing en banc and accept the state court's finding of fact that Ms. Colby made it clear that she could not be impartial on the guilt or innocence issue.

In addition to having improperly rejected the state courts' factual determinations, the panel decision has failed to apply the clearly erroneous rule, Rule 52(a) of the Federal Rules of Civil

[2] McCorquodale is pending en banc.

Procedure, to District Judge Carr's factual finding that Colby had clearly indicated that her personal beliefs against the death penalty would have prevented her from making an impartial decision as to Witt's guilt or innocence (R. 51, pp. 15-16). Cf. Pullman-Standard v. Swint, 456 U.S. 273, 72 L.Ed.2d 66. Accordingly, this court should reconsider its decision and accept Judge Carr's finding.

II.

In footnote 21[3] of Witherspoon, the Supreme Court stated that exclusion for cause is appropriate where it is unmistakably clear:

---

[3] Footnote 21 while instructive is not the specific holding of Witherspoon; rather the Court held that veniremen may not be excluded simply for voicing general objections or expressing conscientious or religious scruples against the death penalty.

> ". . . (1) that they would automatically vote against the imposition of capital punishment without regard to any evidence that might be developed at the trial of the case before them, or
>
> (2) that their attitude toward the death penalty would prevent them from making an impartial decision as to the defendant's guilt."

(20 L.Ed.2d at 785)

In Lockett v. Ohio, 438 U.S. 586, 57 L.Ed.2d 973, the Court again noted that it is appropriate for a trial court to excuse for cause those jurors who cannot abide by existing law and to follow conscientiously the instructions of the trial judge. And most recently, Justice White summarized the principle in Adams v. Texas, 448 U.S. 38, 65 L.Ed.2d 581:

> "This line of cases established the general proposition that a juror may not be challenged for cause based on his views about capital punishment unless those

> views would prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath. The state may insist however, that jurors will consider and decide the facts impartially and conscientiously apply the law as charged by the court."

(Emphasis supplied) (65 L.Ed.2d at 589)

The panel decision misreads Witherspoon and ignores Lockett and Adams. The specific holding of Witherspoon is that veniremen may not be excluded for cause "simply because they voiced general objections to the death penalty or expressed conscientious or religious scruples against its infliction." 20 L.Ed.2d at 785. Juror Colby did more than voice general objection to the death penalty -- she articulated that she could not be impartial on the question of Witt's guilt or innocence. The panel misapprehends Witherspoon; the panel requires a juror to

be unable to find the defendant guilty:

> "Such a response does not indicate an inability, in all cases, to apply the death sentence or to find the defendant guilty where such a finding could lead to capital punishment because it fails to reflect the profundity of any such interference."

(Slip opinion at 4807)

The panel's expansion of Witherspoon is unauthorized by law -- to exclude a juror it is not required that the juror be unable to decide guilt or innocence, only that the juror cannot impartially decide guilt or innocence. Thus, if a juror expresses an ability to decide guilt or innocence but that she would enter the decision-making process other than impartially, Witherspoon would permit excusal and the panel decision would not. Reconsideration of this issue is, therefore, required to maintain uniformity in the law.

Since Colby's views would prevent or substantially impair the performance of her duties as a juror, Witherspoon and Adams permit her excusal. This honorable court should grant rehearing or rehearing en banc in order to correctly apply the Supreme Court decisions. Again, appellee notes Judge Roney's expression of concern for the soundness of the majority's analysis as well as prior Circuit decisions.

In the instant case, the panel holds that the prior decision of Granviel v. Estelle, 655 F.2d 673 (5th Cir. 1981) is not distinguishable:

> " . . . because the court's decision in Granviel turned upon the ambiguity of the venireperson's answers, which were virtually identical to those in this case, and not upon the failure to inquire about the effect of his views on the guilt phase of the trial."
>
> (Slip opinion, p. 4808)

First of all, appellee does not agree that Granviel was correctly decided; Judge Hunter's dissent was more accurate. It is difficult to see the ambiguity of juror Harrison's answer, "No. I could not." 655 F.2d at 684; see also footnote 6, at 691. In any event, the panel decision's claim that Granviel did not turn on the failure to inquire about the effect of the juror's views on the guilt phase is at odds with the very language of Granviel. In explaining why Harrison was improperly excluded under Witherspoon the court compared him to juror Doss in the case of Burns v. Estelle, 626 F.2d 396 (5th Cir. 1980):

> "While Mrs. Doss stated that the possibility of the death penalty would 'affect' her deliberations on any issue of fact, Mr. Harrison made no such representations

> and indeed, was never questioned as to whether his attitude toward the death penalty would prevent him from making an impartial determination as to guilt."

(Emphasis supplied) (Text at 678)

Witherspoon permits excusal for cause if either of the two prongs in footnote 21 is met. In Granviel, the juror was questioned only with respect to prong 1 and in Witt the juror was questioned only with respect to prong 2. The panel decision erroneously concludes that the former controls the latter and ignores the plain language of the earlier case. Rehearing is required.

The record in the instant case establishes prima facie that prospective juror Colby's attitude on capital punishment was more than mere general opposition, that they were such as to prevent or substantially impair the performance of her duties

as a juror; excusal was proper in light of the defendant's failure to elicit through further questioning that she might properly qualify as an impartial juror.

The panel decision purportedly holds that talismanic responses are not required (Slip opinion, pp. 4808 - 09) but nonetheless holds that the word "interfere" is an improper talisman in the colloquy with Ms. Colby. Defense counsel, of course, used that word in his examination of venireman Gehm:

> " . . . But you would not let it interfere with your determination?"

(Slip opinion, p. 4805, n. 9)

The court reasons that the word interfere admits of a great variety of interpretations (Slip opinion, p. 4807) but indeed it is difficult to think of a word in the English language which does not. Semantic

games are unnecessary. Both terms "prevent" and "interfere with" mean to hinder or interpose an obstacle to. This court's preoccupation with form over substance is not required by the Constitution.

III.

Parenthetically, appellee notes that while the panel reaches the correct conclusion that Witt may not obtain federal habeas relief on issue 4 because of Barclay v. Florida, __ U.S. __, 77 L.Ed.2d 235 (1983), incredibly the court orders in the conclusion paragraph at slip opinion p. 4809 that the district court decision on that be vacated. Presumably, this is a misstatement and the court meant to say affirmed.

The panel's less than enthusiastic response to the Barclay decision should be modified sooner rather than later.

Attempting to breathe life into the moribund decision of Goode v. Wainwright, 704 F.2d 593 (11th Cir. 1983), the panel attempts to limit Barclay to a harmless error case when mitigating factors are absent. The real impact of Barclay is that the Constitution is not violated when there is present at least one statutory aggravating factor, the sentence has been reviewed and affirmed by the highest state court and if there is no indication of arbitrariness or capriciousness, federal interference is unwarranted. Bluntly stated, it is not the function of federal courts to resentence, to reweigh or impose their own sense of what the sentence should be.

CONCLUSION

Based on the above and foregoing reasons, arguments and authorities, Appellee

requests a rehearing, or in the alternative, a rehearing en banc.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was sent by U.S. Regular Mail to: William C. McLain, Esquire, Capital Appeals Section, Office of Public Defender, Hall of Justice, 455 North Broadway, Bartow, Florida 33830-3798 this 30th day of September, 1983.

OF COUNSEL FOR APPELLEE

SUPPLEMENTAL BRIEF

(1)

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1983

Case No. 83-1427

LOUIE L. WAINWRIGHT, Secretary,
Department of Corrections,
State of Florida,

Petitioner,

vs.

JOHNNY PAUL WITT,

Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

SUPPLEMENTAL BRIEF OF PETITIONER FILED PURSUANT TO SUPREME COURT RULE 22.6

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12 pp

QUESTIONS PRESENTED

I. Whether the lower court erred in failing to apply the presumption of correctness required by 28 U.S.C. §2254(d) to the state court's factual finding that prospective juror Colby clearly expressed her inability to decide respondent's guilt or innocence because of her capital punishment views?

II. Whether the lower court erred in overturning the District Court's juror excusal ruling when it was not clearly erroneous, thereby violating Rule 52(a), Federal Rules of Civil Procedure?

III. Whether the lower court erroneously applied Witherspoon v. Illinois, 391 U.S. 510 (1968) and Adams v. Texas, 448 U.S. 38 (1980) yielding inconsistent results with other decisions and requiring the exercise of this Court's supervisory review?

IV. Whether, consistently with Witherspoon v. Illinois, 391 U.S. 510 (1968) and its progeny, a trial judge may excuse a prospective juror who fails to provide assurance that she can perform her duties as a juror in impartially deciding the accused's guilt or innocence?

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PRELIMINARY STATEMENT

Petitioner files this Supplemental Brief pursuant to Supreme Court Rule 22.6 for the purpose of calling this Court's attention to decisions announced while the instant certiorari petition was being printed: Texas v. Mead, ____U.S.____, (Case No. 83-791, February 21, 1984), 34 Cr.L. 4196, and Darden v. Wainwright, ____F.2d____ (11th Cir. Case No. 81-5590, February 22, 1984).

ARGUMENT

In questions presented in the instant petition, the petitioner urged that the Eleventh Circuit Court of Appeal has failed to apply the presumption of correctness required by 28 U.S.C. §2254 (d) to the state courts' finding that juror Colby clearly expressed an inability to impartially decide Witt's guilt or innocence. Further support for

petitioner's position can be found in this Court's recent action in denying certiorari in Texas v. Mead, ____U.S. ____ (Case No. 83-791, February 21, 1984), 34 Cr.L. 4196 and the recent Eleventh Circuit en banc decision in Darden v. Wainwright, ____F.2d____ (11th Cir. Case No. 81-5590, February 22, 1984). In dissenting to the denial of certiorari, Mr. Justice Rehnquist (joined by the Chief Justice and Justice O'Connor) observed that the Texas appellate court had given no deference to the trial judge's judgment regarding the juror's opposition to the death penalty:

> "Because of the substantial disarray among state and federal appellate courts as to the degree of deference, if any, due to a trial court's determination that a juror may be excluded for cause under Witherspoon, I would grant certiorari to the Texas Court of Criminal Appeals and review the case."
>
> (34 Cr.L. at 4197)

Justice Rehnquist further observed that the Court has mandated the Witherspoon inquiry but has failed to articulate any standard of review for alleged Witherspoon violations:

> "The result, predictably, has been near chaos throughout the state and federal appellate courts."
>
> (34 Cr.L. at 4198)
>
> "The degree of confusion and the number of conflicting decisions among the state courts on such an important issue of federal constitutional law are troublesome, to say the least. This same disarray exists in federal courts entertaining petitions for writs of habeas corpus under 28 U.S.C. §2254. For example, a panel of the Fifth Circuit Court of Appeals recently split three ways on the question. And the Eleventh Circuit reached opposite results on the proper standard of review in two recent cases and has granted rehearing en banc in one of the cases to consider the issue. I believe this Court has an obligation to clarify its holding in Witherspoon and to resolve these conflicts."
>
> (footnotes deleted)(34 Cr.L. 4198)

Citing Rushen v. Spain, ____U.S. ____, 78 L.Ed.2d 267 (1983) and Smith v. Phillips, 455 U.S. 209 (1982) the three dissenting Justices concluded that the presumption of correctness required by 28 U.S.C. §2254(d) should apply to juror's feelings about the death penalty.

A fourth Justice, Mr. Justice Stevens, concurred with the order denying certiorari on the basis that it was consistent with the Court's practice not to exercise discretionary jurisdiction by accepting for review a question not presented by the petitioner.

The instant certiorari petition is more appropriate for this Court's review. In addition to the reasons enunciated by Mr. Justice Rehnquist, this petition involves the federal court's disagreement with and overruling of the determination made by the state courts and the federal

district court. 28 U.S.C. §2254(d) is directly rather than peripherally implicated. See Marshall v. Lonberger, ____U.S.____, 74 L.Ed.2d 646 (1983); Rushen v. Spain, ____U.S.____, 78 L.Ed. 2d 267 (1983).

In addition to Texas v. Mead, supra, the recent en banc decision of the Eleventh Circuit in Darden v. Wainwright, supra, demonstrates the necessity for this Court to lend guidance to the lower courts regarding the requirements of Witherspoon and the appropriate standard of review. The majority in Darden pay lip service to two different standards (independent review and some deference to the trial judge's assessment) and then substitute their conclusion for that of the state courts and the federal district court. Dissenting Judge Fay (and three other

judges) apparently adopts the view of Judge Higginbotham concurring in O'Bryan v. Estelle, 714 F.2d 365 (5th Cir. 1983) and concludes in a footnote:

> "2. If "abuse of discretion is applied as the standard, there is none; if "a close study of the voir dire transcript to determine whether a venireperson was improperly excluded from the jury" is the standard, the majority has in my opinion failed to study this record closely enough; and if "an independent appellate review" means that the court of appeals is going to determine the state of mind of the venireperson involved, we are simply wrong."

It is now essential that the lower courts be told directly by this Court whether only the words used in Witherspoon must be mechanically recited with no deviation therefrom by prosecutor, defense attorney, or trial judge and whether the federal appellate courts may simply substitute their judgments for that of state judges, yielding the

inconsistent results previously achieved.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, ROBERT J. LANDRY, Counsel for Petitioner, and a member of the Bar of the United States, hereby certify that on the 26 day of March, 73 I served three copies of the Supplemental Brief of Petitioner filed pursuant to Supreme Court Rule 22.6 on William C. McLain, Esquire, Assistant Public Defender, Chief, Capital Appeals Section, Hall of Justice Building, 455 North Broadway, Bartow, Florida 33830-3798 by a duly addressed envelope with postage prepaid.

Robert J. Landry

ROBERT J. LANDRY
Assistant Attorney General
Of Counsel for Petitioner

JOINT

APPENDIX

No. 83-1427

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

LOUIE L. WAINWRIGHT, Secretary,
Department of Corrections
State of Florida,

PETITIONER,

JOHNNY PAUL WITT

RESPONDENT.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

JOINT APPENDIX

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1984; CERTIORARI GRANTED APRIL 30, 1984.

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RECORD ENTRIES

1. Johnny Paul Witt was indicted for first degree murder on November 8, 1973. (SR 9)

2. Jury verdict of guilty was entered on February 20, 1974. (SR 132)

3. Sentence of death was imposed February 21, 1974. (SR 156 - 157)

4. Florida Supreme Court affirmed judgment and sentence on February 7, 1977. Witt v. State, 342 So.2d 497 (Fla. 1977).

5. Certiorari was denied by the United States Supreme Court on October 31, 1977. Witt v. Florida, 434 U.S. 935. Rehearing was denied January 9, 1978. Witt v. Florida, 434 U.S. 1026.

6. Witt filed a motion for post-conviction relief in the State Court on November 2, 1979. The motion was denied December 11, 1979.

7. The Florida Supreme Court affirmed the denial of post-conviction relief on July 24, 1980. Witt v. State, 387 So.2d 922 (Fla. 1980). Rehearing was denied October 13, 1980.

8. Certiorari was denied by the United States Supreme Court on December 25, 1980. Witt v. Florida, 449 U.S. 1067.

9. Witt filed a habeas corpus petition in the United States District Court for the Middle District of Florida on May 5, 1980. (R 1)

10. The United States District Court denied the habeas corpus petition on May 14, 1981. (R 60)

11. Following an evidentiary hearing the District Court denied Witt's Motion to Alter or Amend Judgment on June 17, 1981. (R 68)

12. Witt filed a Notice of Appeal on June 24, 1981. (R 74)

13. The United States Court of Appeals for the Eleventh Circuit filed its opinion on September 16, 1983 and amended it on January 4, 1984.

Johnny Paul WITT, Petitioner,

v.

Louie L. WAINWRIGHT, etc., et al., Respondents.

No. 81-5750.

United States Court of Appeals, Eleventh Circuit.

Sept. 16, 1983.

As Amended on Denial of Rehearing and Rehearing En Banc Jan. 4, 1984.*

Petitioner, who was convicted of first-degree murder in Florida and sentenced to death, appeals from an order of the United States District Court for the Middle District of Florida, George C. Carr, J., which denied his petition for writ of habeas corpus. The Court of Appeals, Tuttle, Senior Circuit Judge, held that: (1) district court did not err in concluding that petitioner, who chose to extend his discussions with police

officer beyond initial unrelated subject matter to encompass murder of a child, knowingly, intelligently, and voluntarily waived his right to an attorney and his privilege against self-incrimination prior to confessing to child's murder, and (2) trial court committed error of constitutional dimension when it dismissed for cause a prospective juror in murder trial who expressed her opposition to the death penalty but who failed to indicate her unequivocal inability to apply the law as charged.

Affirmed in part, reversed in part and remanded.

Roney, Circuit Judge, filed specially concurring opinion.

1. Criminal Law 517.2(2)

District court did not err in concluding that petitioner, who chose to extend his discussions with police officer

beyond initial unrelated subject matter to encompass murder of a child, knowingly, intelligently, and voluntarily waived his right to an attorney and his privilege against self-incrimination prior to confessing to child's murder.

2. Criminal Law 641.3

Petitioner was entitled to assistance of counsel after his first appearance before county judge following his arrest.

3. Habeas Corpus 30(3)

Petitioner, who was convicted of first-degree murder in Florida and sentenced to death, was not entitled to federal habeas relief on basis of his allegation that Florida Supreme Court relied on nonrecord information, such as psychiatric and presentence investigation reports, in direct review of his conviction and sentencing.

4. Criminal Law 412.1(2), 412.2(1)

Petitioner's Fifth Amendment privilege against self-incrimination and Sixth Amendment right to counsel were not violated by use at penalty stage of trial of testimony of psychiatrist who examined petitioner for purpose of assessing his competency to stand trial on murder charge, despite fact that court-appointed psychiatrist who examined petitioner failed to warn him that anything he said could be used against him in court, where petitioner allowed psychiatrist to testify for petitioner's own tactical reasons.

U.S.C.A. Const.Amends. 5, 6.

5. Jury 108

Trial court committed error of constitutional dimension when it dismissed for cause a prospective juror in murder trial who expressed her opposition to the death penalty but who failed to indicate her unequivocal inability to apply the law as

charged.

William C. McLain, Asst. Public Defender, Tenth Judicial Circuit, Bartow, Fla., for petitioner.

Robert J. Landry, Asst. Atty. Gen., Tampa, Fla., for respondents.

Appeal from the United States District Court for the Middle District of Florida.

Before RONEY and KRAVITCH, Circuit Judges, and TUTTLE, Senior Circuit Judge.

TUTTLE, Senior Circuit Judge:

Johnny Paul Witt appeals from the district court's denial of his petition for a writ of habeas corpus. Petitioner was convicted of first degree murder in Florida and sentenced to death. In this appeal, he challenges the district court's determination of his claims regarding:

(1) the admission into evidence of inculpatory statements rendered after he requested an attorney; (2) the Florida Supreme Court's alleged use of non-record material in reviewing his sentence; (3) the admission into evidence during the penalty phase of petitioner's trial of testimony by psychiatrists to whom petitioner had made inculpatory statements during a competency and sanity examination; (4) the trial court's reliance upon non-statutory aggravating circumstances in the sentencing order; and (5) the excusal of three prospective jurors for cause based upon their opposition to the death penalty.

We find, after a thorough review of the entire record, that the district court properly disposed of the first four of petitioner's claims listed above. We are unable to agree with the district court,

however, that the trial court did not commit error of constitutional dimension when it dismissed for cause a prospective juror who expressed her opposition to the death penalty, but who failed to indicate her unequivocal inability to apply the law as charged. This error mandates our reversal of the district court's decision denying petitioner's request for resentencing.

I. BACKGROUND

Petitioner who was convicted of first degree murder for the October 28, 1973, killing of 11 year old Jonathan Kushner, Witt, then 30 years old, was bow and arrow hunting with his younger friend, Gary Tillman. The two apparently had spoken about killing a human on other occasions and even had stalked persons like animal prey.

On the day of the murder, Witt and

Tillman were hunting in a wooded area near a trail often used by children. Tillman apparently struck the victim, who was riding his bicycle along a path through the area, on the head with a star bit from a drill. At that point, Witt assisted Tillman in gagging Kushner and placing him in the trunk of Witt's car. Petitioner and Tillman then drove to a deserted grove and opened the car trunk. The victim was dead, as a result of suffocating from the gag. The two dug a grave for the Kushner boy and then slit his stomach so it would not bloat. Before burying the victim, Witt and Tillman performed various acts of sexual perversion and violence to Kushner's body.

Defendant was found guilty of first degree murder, Fla.Stat.Ann. 782.04(1) (West Supp. 1982), after a jury trial. On February 21, 1974, Witt was sentenced to

death, in accordance with the jury's recommendation, by the Circuit Court for the Seventh Judicial District for Volusia County, Florida. The Florida Supreme Court affirmed that decision on direct review. Witt v. State, 342 So.2d 497 (Fla.), cert. denied 434 U.S. 935, 98 S.Ct. 422, 54 L.Ed.2d 294, reh. denied 434 U.S. 1026, 98 S.Ct. 755, 54 L.Ed.2d 774 (1977). Petitioner then moved to vacate, set aside, or correct the sentence under Fla.R.Crim.P. 3.850. His motion was denied. The Florida Supreme Court affirmed this decision. Witt v. State, 387 So.2d 922 (Fla.), cert. denied, 449 U.S. 1067, 101 S.Ct. 796, 66 L.Ed.2d 612 (1980).

Petitioner sought federal habeas relief from the United States District Court for the Middle District of Florida. That court denied Witt's petition initially

and, after an evidentiary hearing on the Witherspoon issue, affirmed its prior memorandum decision. Petitioner filed a notice of appeal on June 24, 1981. After hearing oral argument in this case, we deferred consideration pending the decision in this Court's en banc case, Ford v. Strickland, 696 F.2d 804 (11th Cir. 1983), which addresses several issues we face here. We now proceed to a consideration of Witt's claims.

II. THE MIRANDA ISSUE--ADMISSIBILITY OF PETITIONER'S CONFESSION

[1] Petitioner was arrested during the afternoon of November 5, 1973. The district court found the following sequence of events transpired. Witt was given the standard Miranda warning and brought to the county jail where he was interrogated simultaneously by sheriff's deputies, an FBI agent, and an assistant

state prosecutor. Petitioner requested an attorney soon after the questioning began. The interrogation at that point properly ceased.

Witt was left in the interrogation room under the custody of Lt. Arnie Myers of the Hillsborough County Sheriff's Department. Lt. Myers testified that petitioner began to complain about the interrogation. Myers claims he cut off Witt's discussion by informing Witt that he was not authorized to discuss the Kushner case. Witt apparently then asked Myers if all of the sheriff's murder cases were solved, and Myers responded by asking which case Witt had in mind. Witt told Myers that Tillman, his co-defendant, possibly had information on the murder of a young girl named Gail Joyner. Myers' interest was piqued because he was working on the Joyner investigation at the time.

Soon after the statement, officers arrived to take Witt to his prison cell for the night. Myers testified that Witt said he would like to continue their discussion the next day, presumably referring to the Joyner case.

On the next day, November 6, Witt had his first appearance before a county judge. Witt was represented by an attorney from the public defenders' office. It is unclear, however, whether petitioner actually consulted with the attorney, even though he requested such an opportunity. On November 7, Myers went to Witt's cell in the early morning to continue their discussion from two days previously. On the way to the interrogation room Myers read petitioner his rights in accordance with routine police procedures.

Upon arriving at the interrogation room, Witt asked Myers if he had spoken

to Tillman yet. Myers responded that he had not, but that someone else had. Witt then asked what Tillman said, to which Myers answered he did not know. Petitioner then was silent for awhile, according to Myers, until he stated that his co-defendant would probably attempt to pin the blame upon him, apparently referring to the Kushner, and not the Joyner, case.

Witt asked Myers for paper and pen, which Myers provided, along with a waiver of rights form. Myers read this waiver form and asked Witt if he understood its contents; Witt responded affirmatively. Myers testified that reading the waiver form was routine police procedure when giving a prisoner writing materials during a questioning session. Witt then wrote out a 13 page confession over the course of several hours. Agent Fred Barnesdale, also of the Hillsborough County Sheriff's

Department, joined Myers at some point while Witt was writing his confession. Barnesdale asked Witt several questions that secured Witt's cooperation in revealing the locations of various aspects of the crime. Witt also tendered an oral confession during the course of November 7. Petitioner's motion to suppress his confession was denied by the trial court on February 12, 1974.

Petitioner contends that his confession was extracted in violation of the constitutional principles set forth in Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966), and Edwards v. Arizona, 451 U.S. 477, 101 S.Ct. 1880, 68 L.Ed.2d 378 (1981). Petitioner argues that the waiver of his right to counsel, while perhaps voluntary, was not intelligent and knowing. He urges that the initiation by the police of further custodial

interrogation after he had unambiguously expressed his desire to consult with an attorney constituted improper coercion. Petitioner concludes that his confession and all evidence stemming from it were inadmissible as violative of his Fifth Amendment right against self-incrimination and his Sixth Amendment right to counsel.

In Miranda, The United States Supreme Court made it clear that the government must show by a "heavy burden" that a waiver of these constitutional rights was voluntary, knowing, and intelligent. 384 U.S. at 475, 86 S.Ct. at 1628. The Miranda doctrine requires that:

> An uncounseled confession may not be introduced into evidence against a criminal defendant unless the government can sustain its "heavy burden" of proving that the defendant has waived his right against self-incrimination and his concomitant right to the presence of counsel and that his waiver was "voluntary, knowing and intelligent."

Nash v. Estelle, 597 F.2d 513 (5th Cir. 1979)(en banc), quoting Miranda, 384 U.S. at 475, 86 S.Ct. at 1628. In Edwards, the Court clarified the rights of an accused person held in custody who has expressed his or her desire to speak with an attorney. The court stated:

> [A]n accused . . ., having expressed his desire to deal with the police only through counsel, is not subject to further investigation by the authorities until counsel has been made available to him, unless the accused himself initiates further communication, exhanges, or conversations with the police.

451 U.S. at 484-85, 101 S.Ct. at 1884-85.

The district court originally relied upon the state court's finding that Witt expressed his desire to confess during a "casual conversation" in his cell on the morning of November 7. Soon after the district court entered its initial memorandum decision, the Supreme Court issued

Edwards v. Arizona. The district court commendably decided to hold an evidentiary hearing on the Miranda issue, in light of Edwards, and reconsidered its initial decision. The court frankly admitted that there was scant record support for the state court's conclusion, upon which the district court had relied. The district court concluded, however, that Witt initiated further contacts with the police after his request for an attorney and that his Fifth and Sixth Amendment rights were therefore not violated.

[2] We find, at the outset of our analysis, that there is no merit to the State's argument that petitioner's right to an attorney had not yet attached at the stage of custodial interrogation being challenged. Petitioner indisputably was entitled to the assistance of counsel after his first appearance before the county

judge on November 6. See Brewer v. Williams, 430 U.S. 387, 388-89, 97 S.Ct. 1232, 1234-35, 51 L.Ed.2d 424 (1977).[1]

The district court's finding that petitioner made a voluntary, knowing, and intelligent waiver of his right to counsel before his confession depended on credibility choices. Witt's testimony conflicted dramatically with that of Myers. The court explicitly credited Myers' testimony. This decision is binding upon our Court absent clear error. Based upon a consideration of the totality of the circumstances surrounding petitioner's confession, we conclude that there is sufficient evidence on the record to support

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[1] It is unnecessary, for the disposition of this issue, for us to consider petitioner's right to counsel on November 5, although we are inclined to believe that the guarantees acknowledged in Brewer should be afforded to petitioner on that date as well.

the district court's determination of the confession's admissibility.

Testimony at the federal habeas evidentiary hearing indicates that Witt initiated the November 5 discussion with Myers about the Joyner case. The testimony also supports the conclusion that Myers initiated the discussion on the morning of November 7 to follow-up their discussion of two days earlier, at Witt's invitation, and with the genuine belief that Witt intended to discuss the Joyner investigation and not the murder involved in this action.[2] Therefore, Myers' questioning of Witt on November 7 was not impermissible.

The record also fairly supports the conclusion that it was petitioner who

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[2] Myers' testimony in this regard, on direct examination, was as follows:

initiated discussion of the Kushner case on November 7. Myers read Witt his rights in accordance with routine police

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Q. So he asked you to come back and visit him the next day so he could conclude his discussion about the Joyner case?

A. Yes sir.

Q. Okay. Now at the conclusion of that meeting on November 5, was it Mr. Witt who suggested that you come back and talk to him some more about the Joyner case?

A. Yes.

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Q. Now, what was your purpose for going to see Mr. Witt on November 7?

A. I felt pretty certain that he would do what he said and help me on the Gail Joyner case, and I felt that with the information that he could provide, I could subsequently talk to Mr. Tillman and shed some light on the Gail Joyner case.

Myers testified on cross-examination as follows:

procedure. Witt decided to confess on his own, with no apparent prompting or coercion by the police, and only after he

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Q. And I believe you testified that he asked you to come back to talk to you again, not about the Kushner case, but about the Joyner case; is that correct?

A. He didn't specify. He just said --we ended up talking about Gail Joyner, and he said, "Come get me tomorrow; we can finish this conversation."

Q. But it was your belief he wanted to talk about the Joyner case?

A. Yes sir.

The state offered into evidence at the evidentiary hearing a "Continuation Report" written by Lt. Myers on November 5, shortly after his first encounter with petitioner. That report materially contradicts Myers' version of the facts as recounted during his oral testimony. Myers wrote:

> I sat silently, suddenly Mr. Johnny Paul Witt related that he find [sic] it difficult to talk to police officers. He qualified that statement by saying:

had been informed of his rights two times, the second with every indication of

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> "I don't have that problem with someone like you" "from an oppressed group." [Lt. Myers is a black male]. I again advised Johnny Witt that I didn't want to question him in reference to the Kushner case. I stated that if he wanted to talk with someone I would get the officer who originated this report back into the interrogation room, he said no I don't trust them, etc. I advised Johnny Witt that I didn't know much about it, the disappearance of Jonathan [sic] Kushner. We were silent again for a short period when Johnny Witt broke the silence by asking: "have yau'll [sic] solved all your murder cases?", I said, "which one do you have in mind?" At this point I suggested to Johnny Witt that if there was something he wanted to talk about to wait until after he had first talked with his attorney. He stated he didn't have any money. I told him the courts would appoint one free, without cost. At this point I went through the complete procedure (constitutional rights) based on the Mirander [sic] decision. Johnny Witt stated that if I had just one more day, I would have

careful regard for Witt's genuine understanding. The introduction of questions by Agent Barnesdale about the location of

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> turned myself in. He interrupted his school of thought by saying "maybe Gary can tell you something about these unsolved murders, I would like to help you. [sic] I stated that I didn't know of any [sic] he asked, "what about the girl with the raccoon" [the Joyner case]. I said, do [sic] Gary know about that?" He stated, "ask him, he probably do" [sic].
>
> I stated to Mr. Witt that I would talk to Gary Tillman whenever I got the opportunity. I asked Mr. Johnny Witt has he hunted in the area before, this was in reference to where Jonathon [sic] Kushner disappeared. . . Johnny Witt stated he was out there approx. two weeks prior to the Kushner deal. I asked him was there any kids out there playing, he said yes. In fact, I ran a little girl away from the area I was in, I told her she might get hurt, to leave. I asked him was he alone, he stated that he was, and that he was driving a yellow car. At this point he asked for more coffee, and I responded as I had earlier. When I returned

of certain acts of the crime did not result in any qualitative difference in petitioner's custodial interrgation. We do not find that Barnesdale extended the subject matter of inquiry beyond those categories already broached by petitioner's voluntary acts.

> with the coffee Johnny Witt stated he couldn't think very well, but would talk with me later. At this point or conversation terminated. (Emphasis added.)

This account of Myers' first encounter with Witt indicates that it was Myers who initiated the discussion of the murder in the instant action, after Witt had requested an attorney.

We cannot escape the fact that the district court had this testimony before it when it rendered its opinion. The court chose to credit Myers' oral testimony in reconstructing the facts surrounding Witt's confession. Since there is substantial support on the record for the district court's account of the facts, we are unable to find that the district court clearly erred in this regard. The result of this conclusion is that Myers' written Continuation Report has no bearing on our Miranda analysis.

We are unable to conclude, as petitioner suggests, that the Hillsborough police ignored Witt's repeated requests for an attorney. The record clearly indicates otherwise. Nor do we find that the police so wore petitioner down, through various pressure tactics and lack of sleep, that his confession was for all practical purposes coerced. The only support for these allegations comes from the testimony of petitioner himself, which the district court found as undeserving of credence. There is not reliable evidence of bad faith in Witt's treatment by the police.3

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3 There is no indication here that the repeated recitation of Miranda warnings, in the face of Witt's unambiguous and repeated requests for an attorney, was anything but routine police procedure designed to comply with constitutional dictates.

In sum, we conclude that the district court did not err in concluding that petitioner knowingly, intelligently, and voluntarily waived his right to an attorney and his privilege against self-incrimination. Lt. Myers merely followed up on a line of inquiry opened up by Witt himself. Witt later chose, albeit unwisely from his perspective, to extend his discussions with Myers beyond the initial subject matter to encompass the murder of the Kushner child. No constitutional principles are violated by the admission into evidence of petitioner's confession.

III. THE BROWN ISSUE--NON-RECORD MATERIAL BEFORE THE REVIEWING COURT

[3] Petitioner argues that the Florida Supreme Court relied on non-record information, such as psychiatric and presentence investigation reports, in the direct review of his conviction and sentencing.

Petitioner claims that this practice infringed on his constitutional guarantees including the right to due process of law, the effective assistance of counsel, confrontation, freedom from cruel and unusual punishment, and the protection against compelled self-incrimination.[4] He argues that the use of this material runs afoul of the principles of Gardner v. Florida, 430 U.S. 349, 97 S.Ct. 1197, 51 L.Ed.2d 393 (1977) (petitioner was denied due process when death sentence was imposed, at least in part, on the basis of information that he had no opportunity to deny or explain).

The en banc court in Ford v. Strickland, 696 F.2d 804 (11th Cir. Jan. 7, 1983) (en banc), denied an identical claim

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[4] Petitioner alleges violations of his Fifth, Sixth, Eighth, and Fourteenth Amendment rights.

in that action. The Ford court relied upon the Florida Supreme Court opinion in Brown v. Wainwright, 392 So.2d 1327, cert. denied, 454 U.S. 1000, 102 S.Ct. 542, 70 L.Ed.2d 407 (1981),[5] to conclude that:

> Even if members of the [Florida Supreme Court solicited the material with the thought that it should, would or might be used in the review of capital sentences, the decision of the Florida court that it should not be so used, the statement that it was not used, and the rejection of the notion that it affected the judgment of the court ends the matter when addressed at the constitutional level.

Ford v. Strickland, 696 F.2d at 811. Due to the absence of any indication contrary to the above statement in the instant action, we must deny petitioner's Brown

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[5] Brown v. Wainwright was a direct petition for writ of habeas corpus by 123 Florida death row inmates alleging the same facts of the solicitation of non-record materials during the pendency of their capital case appeals. The Florida Supreme Court denied class relief.

claim.

IV. THE SMITH ISSUE--ADMISSIBILITY OF PENALTY PHASE PSYCHIATRIC TESTIMONY

[4] After reviewing petitioner's military medical records and reports from two court-appointed psychiatrists who examined petitioner, the trial court determined on January 8, 1974, that Witt was competent to stand trial. The court-appointed psychiatrist examined petitioner without warning him that anything he said could be used against him in court. One of the psychiatrists, however, informed Witt that he had a choice whether to submit to the examination. The psychiatrists later testified, during the penalty phase of petitioner's trial, that Witt had an incurable propensity to commit future violent crimes, that he was a menace to society, and that he was a sexual pervert. The trial judge explicitly relied on some of these factors in reaching his sentencing

decision.

Petitioner argues that his Fifth Amendment privilege against self-incrimination and his Sixth Amendment right to counsel were violated by use of this psychiatric testimony where the psychiatrist failed to warn petitioner that the results of the examination would be used against him in court and that he had the right to remain silent. After the district court issued its decision in this case, but before petitioner's motion to alter, amend, or set aside the judgment, the Supreme Court issued its decision in Estelle v. Smith, 451 U.S. 454, 101 S.Ct. 1866, 68 L.Ed.2d 359 (1981). In Smith, the Court squarely held that use of such psychiatric testimony, secured without adequate warnings to the defendant in the context of a limited and neutral competency examination, constitutes a violation of that

defendant's Fifth and Sixth Amendment rights when used by the state during the sentencing phase.

Were petitioner's claims so straightforward, we would not hesitate to find Smith controlling. The district court, however, identified three distinctions between Smith and the instant action. First, the evidence adduced was not probative as to any of the statuory aggravating circumstances the sentencer was entitled to consider, as was the evidence in Smith under Texas law. Second, the defendant, rather than the trial judge, requested the competency examination. Third, the defendant allowed the psychiatrist to testify for his own tactical reasons and thereby waived any objection to such testimony.

It is irrelevant who actually requested the examination, where it was

conducted for the limited purpose of assessing petitioner's competency to stand trial. Also, whether the psychiatric evidence adduced at the sentencing phase supported a proper statutory aggravating circumstance or not, the fact remains that this prejudicial information was still considered. Despite these areas of disagreement with the district court's decision, we affirm the district court's disposition of this issue. Petitioner's trial attorney did not object to introduction of the psychiatric evidence. Testimony by Witt's attorney clearly indicates that petitioner would have called the psychiatrist to testify during the sentencing phase of his trial had the state failed to do so. Petitioner's failure to object was purely tactical and did not, as Witt suggests, result from his unawareness that the State would use such evidence or from

his improper assessment of how damaging the testimony would ultimately prove to be.

The Supreme Court in Smith recognized that the rule there stated should not invalidate sentences such as the one in this case. The Court noted that, "a different situation arises where a defendant intends to introduce psychiatric evidence at the penalty phase . . ." 451 U.S. at 472, 101 S.Ct. at 1878. Since petitioner is unable to show cause to qualify for exception from the procedural default bar of Wainwright v. Sykes, 433 U.S. 72, 97 S.Ct. 2497, 53 L.Ed.2d 594 (1977), we find that Witt has failed to state a meritorious Smith claim.

V. CONSIDERATION OF NON-STATUTORY AGGRAVATING CIRCUMSTANCES.

This issue has now been decided adversely to Witt by the Supreme Court in

Wainwright v. Goode, __ U.S. __, 104 S.Ct. 378, 78 L.Ed.2d 187 (1983).

VI. THE WITHERSPOON ISSUE--PROPRIETY OF PROSPECTIVE JURORS' EXCUSAL FOR CAUSE

[5] During the jury selection at petitioner's trial, the court excused 11 veniremembers for cause because they expressed opposition to the death penalty. Petitioner urges that three of these dismissals were unconstitutional under the standards set forth by the Supreme Court in Witherspoon v. Illinois, 391 U.S. 510, 88 S.Ct. 1770, 20 L.Ed.2d 776 (1968)[6]

In Witherspoon, the Supreme Court acknowledged that a capital defendant's right to an impartial jury under the Sixth and Fourteenth Amendments is jeopardized

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[6] The Witherspoon standards are applied to bifurcated death penalty trials of the type in this action in Adams v. Texas, 448 U.S. 38, 100 S.Ct. 2521, 65 L.Ed.2d 581 (1980).

by the removal of jurors who merely express their distaste for or philosophical opposition to the death penalty. A jury constituted of only those remaining after such excusals would be a jury "uncommonly willing to condemn a man to die." Witherspoon, 391 U.S. at 521, 88 S.Ct. at 1776. Yet the Court recognized the necessity of excusing for cause those prospective jurors who, because of their lack of impartiality from holding unusually strong views against the death penalty, would frustrate a state's legitimate effort to administer an otherwise constitutionally valid death penalty scheme. The Court resolved these conflicting principles by permitting a state to:

> execute a defendant sentenced to death by a jury from which the only veniremen who were in fact excluded for cause were those who made unmistakeably clear (1) that they would automatically vote against the imposition of capital punishment without regard to any evidence that might be developed at the trial of the case before them, or (2) that their attitude toward the death penalty would prevent them from making an impartial decision as to the defendant's guilt.

Witherspoon, 391 U.S. at 522, n. 21, 88 S.Ct. at 1777, n. 21 (emphasis in original).

The Court, in explaining this test, has indicated a prospective juror must be permitted great leeway in expressing opposition to the death penalty before he or she qualifies for dismissal for cause. A prospective juror may even concede that his or her feelings about the death penalty would possibly color an objective determination of the facts of a case without admitting of the necessary partiality to justify excusal. The Court has stated:

> Nor [does] the Constitution permit the exclusion of jurors

> from the penalty phase of a. . . murder trial if they aver that they will honestly find the facts and answer the questions in the affirmative if they are convinced, beyond reasonable doubt, but not otherwise, yet who frankly concede that the prospects of the death penalty may affect what their honest judgment of the facts will be or what they may deem to be reasonable doubt. Such assessments and judgments by jurors are inherent in the jury system, and to exclude all jurors who would be in the slightest way affected by the prospect of the death penalty would be to deprive the defendant of the impartial jury to which he or she is entitled under the law.

Adams, 448 U.S. at 50, 100 S.Ct. at 2529 (emphasis added).

In the instant action, petitioner challenges the excusal of veniremembers Colby, Gehn, and Miller as unjustified under the Witherspoon standard. The relevant portions of the voir dire of these jurors indicate that the inquiry of prospective juror Colby arguably adduced the

least certain statement of inability to follow the law as instructed. Because we are compelled to reverse petitioner's sentence, if we find a Witherspoon violation with respect to a single prospective juror,[7] we shall limit our consideration to the dismissal of Ms. Colby, the most persuasive instance of a Witherspoon violation of the three excusals cited by petitioner.[8]

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7 Davis v. Georgia, 429 U.S. 122, 123, 97 S.Ct. 399, 400, 50 L.Ed.2d 339 (1976).

8 Prospective juror Gehn engaged in the following colloquy on voir dire:

> Mr. Plowman: I am asking you [to] consider . . . aggravating circumstances . . . would you be able to follow that and come back with a death penalty conviction?
>
> . . . . . .
>
> Mr. Gehn: I am afraid not, sir.
>
> Mr. Plowman: You would not be able to do so?

The following voir dire led to prospective juror Colby's dismissal:

Mr. Gehm: My religious convictions would be foremost in my mind up to this point and possibly beyond that.

Mr. Plowman: Okay.

Mr. Gehm: I am afraid I would be unable to.

****

Mr. Behunisk [for petitioner]: I am saying if you were to return a verdict of guilty of first-degree murder, could you keep an open mind as to whether you should vote for the death penalty or life?

Mr. Gehm: No, I could not.

Mr. Behunisk: Why is that, sir?

Mr. Gehm: I feel that the Almighty is the Judge of life or death.

Mr. Behunisk: That's right. You said that previously. But you would not let it interfere with your determination?

Mr. Gehm: I am afraid that it would be weighing on my mind

Mr. Plowman [for the State]: Now, let me ask you a question, ma'am. Do you have any religious beliefs or personal beliefs against the death penalty?

Ms. Colby: I am afraid personally but not --

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during the trial.

Mr. Plowman: Your Honor, the state would move to dismiss for cause at this time.

The Court: Do you think that this state of mind will prevent you from acting with impartiality? Do you feel that the state of mind that you have will prevent you from acting with impartiality? What I am saying is--

Mr. Gehm: I am afraid it might, sir.

The Court: You are afraid so?

Mr. Gehm: I am afraid it might, sir.

The Court: Okay. Step down. The statement by venireperson Gehm, that he "could not" keep an open mind in sentencing, is far less equivocal than any responses proffered by Ms. Colby.

Mr. Plowman: Speak up, please.

Ms. Colby: I am afraid of being a little personal, but definitely not religious.

Mr. Plowman: Now, would that interfere with you sitting as a juror in this case?

Prospective juror Miller responded to questions on his views about the death penalty as follows:

Mr. Plowman: Okay. Did you hear the discussion that we have had just recently with Mrs. Davis regarding the death penalty?

Mr. Miller: That's right.

Mr. Plowman: Okay. Do you have any strong feelings one way or the other regarding the death penalty?

Mr. Miller: Well I just could-n't bring a--I couldn't vote, I guess, well, I am against the death penalty.

Mr. Plowman: You are against the death penalty? Would that interfere with your determination in this case?

Mr. Miller: I think it would.

Ms. Colby: I am afraid it would.

Mr. Plowman: You are afraid it would?

Ms. Colby: Yes, sir.

Mr. Plowman: Would it interfere with judging the guilt or innocence of the defendant in this case?

Mr. Plowman: Okay. And you wouldn't be able to follow the law as instructed by the Court?

Mr. Miller: When it comes down to a death verdict, I wouldn't.

Mr. Plowman: You could not do it. Okay. Regardless of the law?

Mr. Miller: No, sir.

Mr. Plowman: Okay. Your Honor, the State would move the Court to excuse Mr. Miller for cause.

The Court: Do you feel because of your state of mind regarding that particular situation it would make you unable to render a just and fair verdict in this case?

Ms. Colby: I think so.

Mr. Plowman: You think it would?

Ms. Colby: I think it would..

Mr. Plowman: Your Honor, I would move for cause at this point.

THE COURT: All right. Step down.

Prospective juror Colby's responses are limited to expressions of her feelings and her thoughts on the subject of inflicting

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Mr. Miller: I am against the death verdict. I think it would.

The Court: Step down.

Prospective juror Miller as well offered less ambiguous responses then Ms. Colby and did not merely engage in a discussion of his feelings. He quite firmly indicated that he "wouldn't" be able to follow the law as instructed by the court and that he "could not" register a vote for the death penalty, "regardless of law."

We therefore limit our consideration to the responses provided by prospective juror Colby and do not reach the question of the constitutionality of the for cause excusals of Gehm and Miller.

the death penalty. At no point did she unequivocally state that she would automatically be unable to apply the death penalty or to find petitioner guilty if the facts so indicated. Her statements fall far short of the certainty required by Witherspoon to justify for cause excusal. Perhaps her responses are so devoid of the necessary certainty because of the State's failure to frame its questions in an appropriately unambiguous manner. The State inquired whether Ms. Colby's fears about applying the death pealty would "interfere" with her sitting as a juror in petitioner's case without ever attempting to directly ask those questions the Witherspoon standard seems to require. The word "interfere" admits of a great variety of interpretations, and we would find it quite unnatural for a person, who has already expressed her concern about the

death penalty, to respond otherwise than that her feelings would "interfere" with, "color," or "affect" her determinations. Such a response does not indicate an inability, in all cases, to apply the death sentence or to find the defendant guilty where such a finding could lead to capital punishment because it fails to reflect the profundity of any such "interference." We therefore find that venireperson Colby was improperly excused for cause and that petitioner is entitled to be resentenced as a result of this violation of his constitutional rights.[9]

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[9] Appellees urge us to dismiss petitioner's claim on procedural grounds. The state argues that Witt waived his right to bring this claim in federal habeas court, under Sykes, by failing to object at trial. Appellees invite our attention to Paramore v. State, 229 So.2d 855 (Fla. 1969), vacated on other grounds, 408 U.S. 933, 92 S.Ct. 2857, 33 L.Ed.2d 751 (1972), which they claim establishes a state rule requiring a defendant to indicate his or

The reversal of petitioner's sentence on the basis of venireperson Colby's excusal is mandated by two cases from this

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her desire to keep a challenged juror and to attempt to "qualify" that juror during the voir dire.

The Sykes procedural bar is inapplicable to petitioner's claim because the fact that the Florida Supreme Court on direct appeal considered appellant's Witherspoon claim on the merits, Witt v. State, 342 So.2d at 499, establishes the absence of a state contemporaneous objection rule prohibiting consideration of the propriety of a juror's excusal for cause where an objection was not registered during the trial proceedings. See Henry v. Wainwright, 686 F.2d 311, 313 (5th Cir. Unit B) ("If Florida law dealt with the merits of Henry's objection, whether or not there was a procedural default at trial under state law, then a federal habeas court must also determine the merits of the claim. Lefkowitz v. Newsome, 420 U.S. 283, 292 n.9, 95 S.Ct. 886, 891 n. 9, 43 L.Ed.2d 196 (1975); Ratcliff v. Estelle, 597 F.2d 474, 478 (5th Cir.), cert. denied, 444 U.S. 868, 100 S.Ct. 143, 62 L.Ed.2d 93 (1979).") petition for cert. filed, No. 82-840 (November 17, 1982); Moran v. Estelle, 607 F.2d 1140 (5th Cir. 1979). Also see County Court of Ulster County v. Allen, 442 U.S. 140, 154, 99 S.Ct. 2213, 2223, 60 L.Ed.2d 777 (1979) (when the state courts do not indicate that a "federal constitutional claim is

Circuit of notable factual similarity. In Granviel v. Estelle, 655 F.2d 673 (5th Cir. 1981), the Court evaluated a voir dire in which the prospective juror was asked if he could ever vote to inflict the death penalty. He replied, "No, I don't think I could." Then, in response to the question, "You just don't feel like you would be entitled to take another person's life in that fashion?" He nodded and then said, "No, I could not." The Court found that, "[t]hese questions and answers fall far short of an affirmation by [the prospective juror] that he would automatically vote against the death penalty regardless of the evidence, or that his objections to capital punishment would prevent him from

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barred by some state procedural rule, a federal court implies no disrespect for the State by entertaining the claim."); Booker v. Wainwright, 703 F.2d 1251 (11th Cir. 1983).

making an impartial decision as to guilt." 655 F.2d at 677. Similarly, in Burns v. Estelle, 626 F.2d 396 (1980), the former Fifth Circuit en banc found that the Witherspoon test was not met where a prospective juror merely acknowledged that the presence of the death penalty would "affect" her deliberations. These cases turn on facts substantially similar to both types of answers provided by Ms. Colby: first, where she expressed her thoughts and feelings about imposing the death penalty; and second, where she admitted that these reservations would impose some level of "interference" with her role as an impartial juror. These cases control our decision that the trial judge erred in excusing Colby for cause.[10]

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10 The current uncertainty in our Circuit over the degree of deference under 28 U.S.C. §2254(d) to be accorded to a trial

The State forwards three substantive arguments counseling against a finding of a constitutional violation on these facts. First, appellees claim that any improper excusal was harmless error because the State used only two of its 10 available peremptory challenges. The State suggests it would have challenged juror Colby even if the court failed to remove her for cause. Appellees attempt to distinguish the panel opinion in Burns v. Estelle, 592 F.2d 1297 (5thCir. 1979), on the facts. In Burns, the Court refused to find harmless error where the State had used 13 of

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court's finding of cause, see Darden v. Wainwright, 699 F.2d 1031 (11th Cir. 1983), vacated on reh. en banc, at 1043 (April 6, 1983); Hance v. Zant, 696 F.2d 940 (11th Cir., Jan. 24, 1983) is immaterial to our disposition of appellant's claim. We are convinced that the trial court erred in finding cause for excusal in this instance under even the least rigorous standard of appellate review.

15 peremptory challenges and the petitioner challenged the excusal of four of the prospective jurors. Despite these differences in numbers, the State's argument that there is constitutional significance to the fact that some peremptory challenges remained after the jury was selected must fail under the holding of Davis v. Georgia, 429 U.S. 122, 123, 97 S.Ct. 399, 400, 50 L.Ed.2d 339 (1976) (per curiam) (the improper exclusion of even one out of 83 veniremembers was gounds for reversal of a death sentence). Hance v. Zant, 696 F.2d at 956.

The State's second argument is that the Granviel case, upon which we rely is factually distinguishable because the venireperson there was asked only about his inability to sentence to death, whereas here the prospective juror was also asked about the effect of her conscientious

scruples upon her ability to determine impartially petitioner's guilt or innocence. This argument is unpersuasive because, while we are bound by Granviel as to the first prong of the inquire, Burns controls our determination as to the second--that is whether Mrs. Colby's beliefs would "prevent" her "from making an impartial decision as to the defendant's guilt." Witherspoon, 391 U.S. at 522 n. 21, 88 S.Ct. at 1777 n. 21 (emphasis in original). As discussed above, Mrs. Colby's "thinking" her belief would "interfere with judging guilt or innocence" does not change the posture of the case in favor of the disqualification. Burns v. Estelle, supra at 398.

Appellees finally urge that this Court avoid imposing the de facto requirement that prosecutors ask each prospective

juror certain standard questions and receive "talismanic" answers before excusal for cause may be justified. Appellees also argue that we should refrain from following the Granviel case to the extent that it imposes a per se rule that a prospective juror's use of the term "I think," even when taken out of context, constitutes inadequate grounds for excusal. We agree that no such rule exists in this Circuit. In our reading of Granviel, we find no indication that the Court considered the prospective juror's use of the phrase "I think" as anything but a part of the total circumstances of the voir dire, although a justifiably important part. The decision in this appeal likewise countenances a review of the totality of the circumstances of the voir dire and does not require that the venireperson utter a pat phrase, the incantation of which

agically frees the power of excusal from its yoke of unconstitutionality.

VII. CONCLUSION

We therefore affirm the district court's decision with respect to the first four issues evaluated on this appeal. We reverse the district court's decision on the Witherspoon issue and remand to that court for further proceedings not inconsistent with this opinion.

AFFIRMED IN PART, REVERSED IN PART, and REMANDED.

RONEY, Circuit Judge, specially concurring.

Since I am not prepared to agree that this Court's decision in Goode v. Wainwright, 704 F.2d 593 (11th Cir. 1983) retains its viability in light of Stephens v. Zant, __ U.S. __, 103 S.Ct. 2733, 77 L.Ed.2d 235 (1983), and Barclay v. Florida, __ U.S. __, 103 S.Ct. 3418, 77

L.Ed.2d 1134 (1983), I concur only in the result reached by the Court. Since this case is distinguishable from Goode, it matters not to this decision how these Supreme Court decisions may have detracted from Goode analysis.

Although I doubt the soundness of the analysis which leads to the reversal under Witherspoon v. Illinois, 391 U.S. 510, 88 S.Ct. 1770, 20 L.Ed.2d 776 (1968), I recognize the Court's attempt to faithfully follow the decisions in the Circuit which, although questionable, guide that analysis and I therefore do not dissent.

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

JOHNNY PAUL WITT,

Petitioner,

v. Case No. 80-545-CIV-T-GC

LOUIE L. WAINWRIGHT, Secretary, Florida Department of Corrections, and JIM SMITH, Attorney General, State of Florida,

Respondent.

MEMORANDUM OPINION AND ORDER

I.

On February 20, 1974, Petitioner Johnny Paul Witt was found guilty of first degree murder by a Volusia County, Florida, Circuit Court jury. Pursuant to the Florida capital sentencing statute[1] the trial judge sentenced Petitioner to death on February 21, 1974. The Supreme Court

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[1] Fla. Stat. §921.141 (1973).

of Florida subsequently affirmed the conviction and death sentence, Witt v. State, 342 So.2d 497 (Fla. 1977), and the United States Supreme Court denied a petition for certiorari, Witt v. Florida, 434 U.S. 935 (1977), reh. denied, 434 U.S. 1026 (1978). A motion for stay of execution and a petition for writ of habeas corpus asserting eight grounds for relief (grounds 12A - H) were filed on May 5, 1980. Prior to this Court's ruling on the former, the Supreme Court of Florida stayed Petitioner's execution pending its review of his motion for postconviction relief. The Florida Supreme Court affirmed the denial of Petitioner's postconviction relief motion and vacated the stay of execution on July 24, 1980; thereafter, the Supreme Court of the United States denied a petition for writ of certiorari. Witt

v. Florida, __ U.S. __, 101 S.Ct. 796 (1981). An amended petition adding a ninth ground (12I) was filed March 3, 1981. On April 23, 1981, the Court received evidence and heard oral argument on the eight issues raised in the original petition.[2] Those issues shall be analyzed in the order in which they appear in the original and amended petitions.[3]

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2 The Court heard oral argument on Respondent's Motion to Dismiss the ninth ground on April 3, 1981. Because Respondent's motion has been granted in a separate opinion and order, ground 12I is not addressed here.

3 More detailed analyses of the facts underlying Petitioner's claims are set forth as necessary in the context of the specific issues to which they pertain. For a general statement of the circumstances surrounding the crime for which the Petitioner was convicted, see Witt v. State, supra at 499.

II.
A. THE ROLE OF NONSTATUTORY AGGRAVATING CIRCUMSTANCES IN THE SENTENCING CALCULUS

Grounds 12A and B of the petition set forth Petitioner's contention that his sentence of death is violative of the Eighth Amendment prohibition against cruel and unusual punishment, made applicable to the states via the Fourteenth Amendment as well as the Fourteenth Amendment's due process and equal protection clauses because (1) the sentence was based in part on nonstatutory or improper aggravating circumstances and (2) the judge and jury heard evidence of these circumstances during the sentencing phase of the bifurcated trial. Because these claims are inextricably intertwined, they are treated jointly.

1. GROUND 12A

Imposition of the death penalty by

the states is not unconstitutional per se, so long as it is done pursuant to properly drawn statutes which guide discretion and eliminate the arbitrariness and capriciousness condemned by the Supreme Court in Furman v. Georgia, 408 U.S. 238 (1972). Spinkellink v. Wainwright, 578 F.2d 582 (5th Cir. 1978). Florida's capital sentencing procedure, which provides for examination of aggravating and mitigating circumstances prior to imposition of sentence and automatic review of death sentences by the Florida Supreme Court, was found constitutional on its face in Proffitt v. Florida, 428 U.S. 242 (1976).

The Petitioner contends that the trial court applied Fla. Stat. §921.141 (1973)[4] unconstitutionally in this

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[4] The Florida capital sentencing statute was amended in 1974, 1977 and 1979.

case because in fixing the sentence it relied in part on nonstatutory aggravating circumstances (premeditation and propensity to commit further violent crimes) and incorrectly found applicable the statutory aggravating circumstance of creation of a great risk of death to many persons, §921.141(5)(c). The cornerstone of Petitioner's argument is Ellege v. State, 346 So.2d 998 (Fla. 1977), cited for the proposition that where a death sentence is based in part on nonstatutory or improper aggravating circumstance is also present, the sentence must be reversed.

There is no doubt that at the time of Petitioner's setencing, Fla. Stat. §921.141(5) included neither propensity nor premeditation as a proper aggravating circumstance. It is also true that where, as here, only one person other than the

accused and his victim were present at the murder scene, the statutory factor of great risk of death to many persons under §921.141(5)(c) cannot properly be found. Kampff v. State, 371 So.2d 1007, 1009 (Fla. 1979). The trial court's inclusion of the above factors in its "Findings of Facts in Support of the Death Penalty"[5] was therefore technically improper. Contrary to the position of Petitioner, however, it does not automatically follow that in every instance in which a trial court's findings include nonstatutory or improper aggravating circumstances coupled with a mitigating circumstance the capital sentencing statute has been unconstitutionally applied. The key difficulty in

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5 The trial court's sentencing Order is set forth in full as an appendix to this Opinion.

Ellege was the fact that it was implicit in the trial court's sentencing order that mitigating circumstances existed, but the specific findings of fact failed to identify them so that it was impossible to know what factors the court had weighed in arriving at its decision. 346 So.2d at 1003. In the instant case, however, the trial court's sentencing order specifically identifies Petitioner's age as the sole mitigating circumstance and includes two proper statutory aggravating circumstances -- the fact that the murder was committed in the course of a kidnapping, and the fact that it was committed in an especially heinous, atrocious or cruel fashion. §921.141(5)(d) and (h). Thus, this case is dissimilar to Ellege and is controlled instead by Brown v. State, 381 So.2d 690 (Fla. 1980). In a fact pattern strikingly

similar to Petitioner's, the Brown trial court considered improper aggravating circumstances (including misapplication of factor 5(c), great risk of death) and identified a single mitigating circumstance, age. The Supreme Court of Florida concluded that Ellege did not compel reversal, reasoning that

> unlike Ellege, here "we can know" that the result of the weighing process would not have been different had the impermissible factors not been present. 346 So.2d at 1003. The trial judge has told us in his order that the appellant's age, 22 at the time of the offense and 23 years at the time of the trial, had only "some minor significance." When this tenuous factor is juxtaposed against at least two well-founded aggravating circumstances it is beyond reason to conclude that the trial judge's decision to impose the death penalty would have been affected by the elimination of the unauthorized aggravating circumstances. This case then is dissimilar to Ellege, but like Hargrave v. State, 366

> So.2d 1 (Fla. 1978), where the doubling up of aggravating circumstances was not fatal to the imposition of a death sentence even in light of the existence of two mitigating circumstances. Here, as there, ample other statutory aggravating circumstances exist to convince us that the weighing process has not been compromised. Given the imprecision of the criteria set forth in our capital punishment statute we must test for reasoned judgment in the sentencing process rather than a mechanical tabulation to arrive at a net sum.

Brown, supra at 696. The fact that the trial judge in Petitioner's case did not, unlike the trial judge in Brown, elaborate on the weight assigned the age factor is not telling: The Florida Supreme Court has repeatedly found age per se an insignificant mitigating factor. See Holmes v. State, 374 So.2d 944 (Fla. 1979); Washington v. State, 362 So.2d 658 (Fla. 1978); Alvord v. State, 322 So.2d 533 (Fla. 1975); Songer v. State, 322 So.2d

481 (Fla. 1975); Sullivan v. State, 303 So.2d 632 (Fla. 1974). Indeed, in its affirmance of his conviction and sentence on direct appeal, the Supreme Court of Florida stated that Petitioner's age was a factor contributing to his dominance of his codefendant such that his death sentence was justified even though Petitioner's codefendant was sentenced to life imprisonment. Witt v. State, supra at 500 - 501. Therefore, viewing the sentencing phase of Petitioner's trial in the "totality of the circumstances present", Ellege, supra at 1003; State v. Dixon, 283 So.2d 1, 10 (Fla. 1973), the Court finds that the sentencing authority's discretion was properly guided by Fla. Stat. §921.141, and that imposition of the death sentence was not rendered cruel and unusual, nor violative of the due process and equal

protection clauses by virtue of the trial court's inclusion of nonstatutory and improper aggravating circumstances in its sentencing order.[6]

2. GROUND 12B

Because the trial court's recitation of nonstatutory and improper aggravating circumstances in its sentencing order was not an unconstitutional application of the Florida capital sentencing statute, it

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6 The Court is unpersuaded by Petitioner's reliance on the federal district court's decision in Henry v. Wainwright, No. 79-584-Orl-Civ-R (M.D. Fla., February 14, 1980). In that case the court held, based on Ellege and Dixon, that where the state trial court's instruction failed to limit the jury's consideration to the statutory aggravating circumstances listed in §921.141(5), a new sentencing hearing was required. Henry does not discuss the more recent Brown case, and based on the close proximity in time of decision (Brown January 31, 1980; Henry, February 14, 1980), there is a high likelihood that the federal court did not have the benefit of Brown in reaching its decision.

follows a fortiori that the fact that the judge and jury heard evidence of these circumstances during the penalty phase of the trial is insignificant. Nevertheless, Petitioner's argument that it was improper for the fact finder to have received evidence concerning injuries occurring after the death of the victim in considering aggravating factor 5(h) (capital felony was especially heinous, atrocious, or cruel) merits further discussion.

Petitioner's argument is founded on Halliwell v. State, 323 So.2d 557 (Fla. 1975), which held that the infliction of post death injuries many hours after completion of a murder is not relevant to factor 5(h), while the infliction of such injuries prior to death or instantly thereafter is relevant. Halliwell, therefore, does not exclude from

consideration during the sentencing portion of trial all evidence of post death mutilation; instead, it merely discards that evidence so temporally distant from the actual completion of the murder that it is irrelevant to circumstance 5(h). The evidence in Petitioner's case indicates that the mutilation and dismemberment of the victim occurred closer in time to the murder than the post death injuries in Halliwell. (R 901, 974 - 980)[7] More importantly, in those Florida decisions that have considered this issue and held improper the introduction of such evidence, the post death injuries were generally inflicted to facilitate concealment or disposal of the corpse; in Petitioner's case, however, the injuries were

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[7] Record references are to the record on appeal.

apparently inflicted for the gratification, sexual and otherwise, of the Petitioner and his codefendant. It is the Court's view that in this circumstance the mutilation and dismemberment of the victim's corpse is relevant to the issue of whether the murder was especially heinous, atrocious or cruel, and the receipt of that evidence was therefore within the bounds of Fla. Stat. §921.141(5)(h). Ground 12B of the amended petition is therefore without merit.

B. PSYCHIATRIC TESTIMONY AND THE SELF INCRIMINATION PRIVILEGE

Dr. Arturo Gonzalez, a court-appointed psychiatrist, examined Petitioner prior to trial to determine both his competency to stand trial and his sanity at the time of the offense. During the sentencing phase of trial, Dr. Gonzalez testified as to the "efficient manner" in which the

murder was committed (R 1132, 1135)[8] and the Petitioner's propensity to commit violent criminal acts. Because the trial court's sentencing order included propensity and premeditation as aggravating circumstances, Petitioner argues (in ground 12C of the amended petition) that use of his statements to Dr. Gonzalez and the conclusions based on them violated his privilege against self-incrimnation. This contention is based entirely on the Fifth Circuit's recent decision in Smith v.

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[8] Petitioner contends in his evidentiary hearing brief that Dr. Gonzalez testified that the crime was performed in a "cunning and efficient" manner (emphasis added). Careful review of the trial transcript, however, reeals that while the state incorporated the word "cunning" into its questions and its characterizations of testimony, Dr. Gonzalez neither used the term nor adopted it inferentially. (R 1131 - 1132; 1134 - 1135). Dr. Daniel Sprehe, however, did describe the Petitioner's actions as "cunning". (R 1172)

Estelle, 602 F.2d 694 (5th Cir. 1979), cert. granted 455 U.S. 926 (1980).

Petitioner's ground 12C is meritless. Since consideration of improper and non-statutory aggravating circumstances in this case did not unconstitutionally imbalance the weighing process and the trial court's sentencing decision would have been the same "had the impermissible factors not been present," Brown, supra at 696, Dr. Gonzalez' testimony is not of constitutional consequence.[9] Additionally, Smith is inapposite to the facts at hand. Under the Texas statute involved

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9 The same reasoning precludes Petitioner from availing himself of the "cause and prejudice" exception to the rule of Wainwright v. Sykes, 433 U.S. 72 (1977), to excuse his failure to interpose a contemporaneous objection to Dr. Gonzalez' testimony: Given the totality of the circumstances, Petitioner was not "prejudiced" by the evidence of propensity and premeditation.

in Smith, the trial judge was required to impose a death sentence if the jury answered three statutory questions in the affirmative, the second question going to the defendant's propensity to commit further violent, criminal acts. In Smith, the trial court ordered a psychiatric examination of its own volition without notice to defense counsel; introduction of the psychiatrist's testimony totally surprised the defense attorneys, giving them "no chance to prepare a response to [the] testimony, or to impeach it in any significant way." 602 F.2d at 696 - 701. The Court accordingly held that a defendant may not be compelled to speak to a psychiatrist who can use his statements against him at the sentencing phase of a capital trial. Id. at 708.

By contrast to the Texas statute in

Smith, the statute in issue here did not include propensity as a proper aggravating factor; indeed, as Petitioner points out in grounds 12A and B, it was technically improper for that circumstance to have been considered. Moreover, in Florida the ultimate sentencing decision is the product of balancing aggravating and mitigating circumstances rather than a mechanical counting of responses to statutory questions as under the Texas scheme. See Dixon, supra at 10. More importantly, the linchpin of Smith was the defense's "manifest surprise" by the "devasting" psychiatric testimony. 602 F.2d at 696 - 699. In contrast, Petitioner's trial counsel was not surprised by the psychiatric testimony, and his failure to object to it was motivated at least in part by tactical considerations, as his deposition

testimony reveals. Deposition of Peter B. Behuniak, pp. 11, 28, 29, 34. Therefore, because Dr. Gonzalez' testimony was not prejudicial to Petitioner, and because the rationale of Smith is inapplicable, Petitioner's ground 12C is rejected.

C. SUFFICIENCY OF THE TRIAL JUDGE'S FINDINGS AS TO AGGRAVATING AND MITIGATING CIRCUMSTANCES

In ground 12D of his amended petition, Petitioner contends that the trial judge's sentencing order fails to divulge the facts upon which it is based, violating his right to adequate appellate review.

Florida law does not require that the trial court's order regarding mitigating and aggravating circumstances follow any particular form. Holmes v. State, 374 So.2d 944, 950 (Fla. 1979). Rather, "[i]t must appear that the sentence imposed was

the result of reasoned judgment." Id. That the sentencing decision here was the result of reasoned judgment is amply supported by the record, and the court's failure to set forth its findings with greater particularity does not contravene the Eighth Amendment or the Fourteenth Amendment.

D. DISPROOF BEYOND A REASONABLE DOUBT OF THE MITIGATING FACTOR OF MENTAL OR EMOTIONAL DISTURBANCE

Petitioner next argues (under ground 12E of his amended petition) that, based upon the psychiatric evidence presented at the sentencing phase of trial, he was suffering from a mental or emotional disturbance at the time of the murder, a mitigating factor under the Florida statute. Fla. Stat. §921.141(6)(b). It is contended that the state failed to negate this circumstance beyond a reasonable doubt,

that the trial court erroneously rejected Petitioner's proof of this circumstance, and that the death sentence is therefore unreliable and arbitrary in violation of the Eighth and Fourteenth Amendments.

Petitioner's position is predicated on his two-fold presumption that (1) the trial court did not find (or could not have found) the mitigating circumstances of mental or emotional disturbance negated beyond a reasonable doubt, and (2) reasonable doubt is the standard of proof the trial court was required to employ in evaluating statutory aggravating and mitigating circumstances. As to the first presumption, the mere fact that the state trial court did not find mental or emotional disturbance a mitigating circumstance does not compel this Court to conclude that a standard less stringent

than "beyond a reasonable doubt" was employed. The trial court's determination that circumstance 6(b) did not apply is buttressed by expert testimony that at the time of the crime the Petitioner was in full possession of his mental faculties, suffering from neither psychosis nor neurosis. (R 1128, 1172, 1174). This court is therefore unwilling to upset the presumptively correct factual determination of the state trail court. Sumner v. Mata, __ U.S. __, 101 S.Ct. 764 (1981).

Finally, while it is incumbent upon the prosecution in a criminal case to prove beyond a reasonable doubt every fact necessary to constitute the crime charged, In re Winship, 397 U.S. 358, 368 (1970), it does not automatically follow that during the sentencing phase of a capital trial in Florida the existence of all

possible mitigating circumstances must be disproven by the same standard. In Mullaney v. Wilbur, 421 U.S. 684 (1975), relied upon by the Petitioner, the Supreme Court struck down the Maine rule requiring a homicide defendant to prove that he acted in the heat of passion on sudden provocation by a preponderance of the evidence to reduce murder to manslaughter, holding that it was incumbent upon the prosecution to show the absence of passion beyond a reasonable doubt. Mullaney, however, addressed the proof standard for an essential element of the offense of murder and not, as here, the standard of proof for a statutory mitigating circumstance during the sentencing phase of a capital trial after the issue of guilt has been resolved. Mullaney does not stand for the proposition that the prosecution must prove

beyond a reasonable doubt any fact affecting tne blameworthiness of an act or the severity of punishment authorized for its commission, and the Supreme Court so ruled in Patterson v. New York, 432 U.S. 197 (1977).

Patterson upheld the New York rule requiring the defendant in a second degree murder prosecution to prove by a preponderance of the evidence the affirmative defense of extreme emotional disturbance to reduce the crime to manslaughter. 432 U.S. at 214 - 215. The instant case, involving proof of the mitigating circumstance of mental or emotional disturbance, is more akin to proof of the affirmative defense of extreme emotional disturbance in Patterson than proof of an element of the offense itself in Mullaney; hence, the rationale of the former controls.

Therefore, because (1) it has not been shown that the trial judge employed a proof standard less stringent than beyond a reasonable doubt in rejecting Petitioner's evidence as to mitigating circumstance 6(b), and (2) Petitioner has failed to demonstrate that in this context beyond a reasonable doubt is the requisite standard, ground 12E of the amended petition is untenable.

E. INTENT REQUIRED FOR IMPOSITION OF THE DEATH PENALTY

In ground 12F of the amended petition, Petitioner argues that the Eighth and Fourteenth Amendments to the Constitution prohibit imposition of the death penalty where a Defendant does not possess a specific intent to cause the death of the victim, and that the evidence in this case shows that Petitioner lacked that intent. Petitioner's argument is based primarily

on the concurring opinion of Justice White in Lockett v. Ohio, 438 U.S. 586, 621 (1978) and language extracted from Coker v. Georgia, 433 U.S. 584 (1977) and Furman v. Georgia, 408 U.S. 238 (1972).

The opinions cited do not stand squarely for the proposition asserted; namely, that the state must prove the Defendant's specific intent to kill before a death sentence can be imposed. In Lockett, the Supreme Court discussed the propriety of the death penalty in a multi-defendant felony-murder situation. Justice White's conclusion that "it violates the Eighth Amendment to impose the penalty of death without a finding that the defendant possesses a purpose to cause the death of the victim," 438 U.S. at 624, was not adopted by the full court. Indeed, the Lockett majority specifically declined

ruling on the defendant's contention that the death penalty is constitutionally disproportionate for one who has not been proven to have intended to take life. 438 U.S. at 608 n. 16.

Alternatively, assuming that the Petitioner is correct and that specific intent to cause the victim's death must be shown, the record adequately illustrates that Petitioner in fact had that intent, as the following trial testimony illustrates:

> Q. Deputy Barnsdale, did you have occasion to ask the Defendant, Johnny Paul Witt, why he was in the area near the 7-Eleven Store, on North Dale Mabry on October 18, 1973?
>
> A. Yes, I did. He stated to me that they had gone there to kill somebody.
>
> (R 974)

• • • •

Q. Deputy Barnsdale, what did he tell you?

A. He stated simply that they had gone out there to kill somebody, and I made it a point to ask him if he had gone out there for the purpose of killing Jonathan Kushner? And he at that time made a comparison between killing human beings and hunting animals.

Q. Did he specifically tell you that he was there to kill?

A. He said that he was there to kill a person, that he had not singled out Jonathan Kushner; and in his comparison, he said, "when you go rabbit hunting, you don't go to hunt a certain rabbit; you kill whatever comes by."

(R 975 - 976)

In the sentencing phase there was further testimony relating to the Petitioner's intent:

> Q. Mr. Dickson, did he tell you whether or not they had made any preparations to carry out this intent to kill on the 29th of October, 1973?
>
> A. Well, he told me that on

> this particular day that they did kill the Kushner boy that they had prepared themselves by having some rope and a T-shirt and this star drill which they planned to use to kill this boy.

(R 1110)

Because the state is not required to prove that Petitioner specifically intended to take the victim's life for imposition of the death penalty, and because even under the rule urged in Justice White's Lockett concurrence, the record contains adequate evidence of specific intent to kill, ground 12F of the amended petition is meritless.

F. THE EXCLUSION OF JURORS AND WITHERSPOON V. ILLINOIS

Based on the principles established in Witherspoon v. Illinois, 391 U.S. 510 (1968) and its progeny, Petitioner argues in ground 12G of the amended petition that the exclusion of seven prospective jurors

from his panel violated the Sixth and Fourteenth Amendments.

Witherspoon held that "a sentence of death cannot be carried out if the jury that imposed or recommended it was chosen by excluding venireman for cause simply because they voiced general objections to the death penalty or expressed conscientious or religious scruples against its infliction." 391 U.S. at 522. Execution of a death sentence is not precluded, however, where excluded veniremen make it clear that their attitude towards the death penalty would prevent them from either making an impartial decision as to the defendant's guilt or imposing a sentence of death once guilt is established. Id., at 522 - 523, n. 21; Adams v. Texas, __ U.S. __, 100 S.Ct. 2521 (1980).

Respondent contends that consideration of the Witherspoon claim is barred due to the failure of Petitioner's trial counsel to contemporaneously object to the exclusion of the jurors at voir dire.[10] However, because the Florida Supreme Court considered the merits of this issue on Petitioner's direct appeal, Witt v. State, supra at 499, this Court is not precluded from considering it in the context of this habeas corpus proceeding. Moran v. Estelle, 607 F.2d 1140 (5th Cir. 1979).

Upon application of the rule of Witherspoon and its progeny to the voir dire of the seven excused jurors, this Court concludes that the exclusion of juror Evelyn Colby is the only case meriting

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[10] Petitioner's trial counsel objected only to the exclusion of prospective juror Kazmierczak.

discussion.[11] Colby was successfully challenged for cause on the basis of the following exchange:

> Q. (MR. PLOWMAN, prosecutor)
>
> Now, let me ask you a question, ma'am. Do you have any religious beliefs or personal beliefs against the death penalty?
>
> COLBY:
>
> I am afraid personally but not--
>
> MR. PLOWMAN:
>
> Speak up, please.
>
> COLBY:
>
> I am afraid of being a little personal, but definitely not religious.

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[11] Review of the voir dire of the other six jurors immediately reveals that their exclusions were clearly justified under the Witherspoon precepts. See R 512, 580 (Kazmierczak); R 514, 535 - 536 (Gehm); R 610 - 612 (Hill); R 591 - 592 (Davis); R 595 - 596 (Miller); and R 648 - 649 (Sherman).

> MR. PLOWMAN:
>
> Now, would that interfere with you sitting as a juror in this case?
>
> COLBY:
>
> I am afraid it would.
>
> MR. PLOWMAN:
>
> You are afraid it would?
>
> COLBY:
>
> Yes, Sir.
>
> MR. PLOWMAN:
>
> Would it interfere with judging the guilt or innocence of the Defendant in this case?
>
> COLBY:
>
> I think so.
>
> MR. PLOWMAN:
>
> You think so.
>
> COLBY: I think it would.
>
> MR: PLOWMAN:
>
> Your Honor, I would move for cause at this point.

THE COURT:

All right. Step down.

MR. PLOWMAN:

Step down, ma'am.

(R 505 - 506)

The Petitioner contends that it is apparent from the foregoing that Colby's responses ("I am afraid . . . I think . . .") did not make it unmistakably clear that she would vote against the imposition of the death penalty or that her attitude towards the death penalty would prevent her from making an impartial decision as to his guilt. Petitioner argues that responses almost identical to those given by Colby were declared inadequate to justify exclusion of potential jurors in Maxwell v. Bishop, 398 U.S. 262 (1970). In Maxwell, the Supreme Court found a Witherspoon violation based on the following colloquies:

> Q. If you were convinced beyond a reasonable doubt at the end of this trial that the Defendant was guilty and that his actions had been so shocking that they would merit the death penalty do you have any conscientious scruples about capital punishment that might prevent you from returning such a verdict?
>
> A. I think I do.

Another venireman was removed from the jury panel on the basis of the following:

> Q. Do you entertain any conscientious scruples about imposing the death penalty?
>
> A. Yes, I am afraid I do.

398 U.S. at 264.

It is immediately apparent that while the responses of Colby resemble the responses of the prospective jurors in Maxwell, the questions eliciting them cannot be compared. Colby's statements read in their entirety clearly indicate that her personal beliefs against the death penalty would have prevented her from

making an impartial decision as to the Petitioner's guilt or innocence, which is sufficient to justify her exclusion under Witherspoon and Adams. Given that there exists no ironclad rule that responses to questions on voir dire incorporating the phrases "I think" or "I am afraid" necessarily involve Witherspoon defects,[12] and reading the responses of Colby in context, the Court concludes that her exclusion did not violate Petitioner's rights under the Sixth and Fourteenth Amendments. The state court's presumptively correct factual determination should accordingly stand. Sumner, supra.

G. ADMISSION OF PETITIONER'S ORAL AND WRITTEN CONFESSIONS

Finally, in his ground 12H Petitioner

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12 See, for example, Brown, supra at 694.

contends that his thirteen page handwritten confession and oral statements, obtained after his request to consult an attorney, were admitted into evidence at trial in violation of the Fifth, Sixth and Fourteenth Amendments. The trial court denied Petitioner's motion to suppress these statements, and on direct appeal the Florida Supreme Court ruled that the confession was voluntary and that Petitioner had waived his right to counsel. Witt v. State, supra at 499 - 500. Petitioner now argues that the state courts erred and that this Court may properly review the admissibility of the statements under 28

U.S.C. §2254(d)(6) and (7).[13]

The record and the opinion of the Supreme Court of Florida in Witt, supra at 499, reveal the following: After his arrest on November 5, 1973, Petitioner was fully advised of his rights and he requested counsel. (R 344 - 345, 364, 852). Questioning was halted and the Petitioner's request was communicated to the public defender's office by the sheriff's department. (R 364, 371). On November 6, 1973, Petitioner made his first appearance before a judicial officer with counsel

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[13] Under §2254(d), the findings of the state courts are accorded a presumption of correctness, unless one of eight enumerated statutory exceptions applies. Petitioner here contends that the presumption is overborne by (1) his failure to receive a full, fair and adequate hearing before the trial court and the Florida Supreme Court, §2254(d)(6), and (2) denial of due process in the state court proceedings, §2254(d)(7).

(R 372, 376), although he contends that he had no opportunity to consult counsel at the appearance. On November 7, 1973, while conversing casually for a few minutes with a detective in his cell, Petitioner indicated his desire to confess. (R 396 - 397, 872). Petitioner was taken from his cell to the sheriff's offices where he made both an oral and a handwritten confession. (R 399, 883). That the Petitioner was fully advised of his constitutional rights and had specifically rejected an offer to consult counsel (he had signed a waiver) is not in dispute.

Based on the foregoing, this Court is of the opinion that as to the issues raised here, the Petitioner received a full, fair and adequate hearing in the state proceedings which comported with the requirements of due process. The Court

finds further that the state courts' rulings were made pursuant to the appropriate legal standards and that the Petitioner has failed to provide convincing evidence that their factual determinations were erroneous. See Sumner, supra at 771; 28 U.S.C. §2254(d). Ground 12H of the amended petition for writ of habeas corpus is therefore rejected.

III.

Based on the foregoing analysis and the fact that Respondent's motion to dismiss count 12I of the amended petition has been granted, it is Ordered that the amended petition for writ of habeas corpus is DENIED.

DONE AND ORDERED in Chambers in Tampa, Florida this 14th day of May, 1981.

George C. Carr
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES COURT OF APPEAL
FOR THE ELEVENTH CIRCUIT

JOHNNY PAUL WITT,

Petitioner-Appellant,

v. CASE NO. 81-5750

LOUIE L. WAINWRIGHT,

Respondent-Appellee.

APPEAL FROM THE
UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF FLORIDA

PETITION FOR REHEARING
AND
SUGGESTION FOR REHEARING EN BANC

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I. CERTIFICATE OF INTERESTED PERSONS

Not applicable.

II. STATEMENT OF COUNSEL

I, Robert J. Landry, attorney for Appellee, express a belief based on reasoned and studied professional judgment that the panel decision involves the following questions of exceptional importance:

1. Whether a federal court of appeals on review of a denial of habeas corpus may ignore and reject factual findings made by the state courts and the federal district court that a venireperson made it unmistakably clear that her capital punishment views prevented her from being impartial as to the defendant's guilt or innocence.

2. Whether the panel decision has misapplied Witherspoon v. Illinois, 391 U.S. 510, 20 L.Ed. 2d 776 (1968) and Adams v. Texas, 448 U.S. 38, 65 L.Ed.2d 581 (1980) by requiring that the venireperson be "unable to find the petitioner guilty" rather than simply requiring that the

juror be able to make an impartial decision as to guilt or that the juror's performance of his duties would be substantially impaired.

III. STATEMENT OF THE CASE PROCEEDINGS AND DISPOSITION OF CASE

Appellant Witt was convicted in Florida of first degree murder and received a sentence of death. He exhausted his state court remedies and filed a petition for writ of habeas corpus. The district court denied relief. On appeal, a panel affirmed in part and reversed in part holding that the sentence of death was constitutionally infirm, that there had been a violation of Witherspoon v. Illinois, 391 U.S. 510, 20 L.Ed.2d 776 (1968).

IV. STATEMENT OF FACTS NECESSARY TO THE ARGUMENT

As indicated in the panel opinion, the following voir dire led to the excusal of prospective juror Colby's dismissal:

"Mr. Plowman [for the State]: Now, let me ask you a question, ma'am. Do you have any religious beliefs or personal beliefs against the death penalty?

Ms. Colby: I am afraid personally, but not - -

Mr. Plowman: Speak up, please.

Ms. Colby: I am afraid of being a little personal, but definitely not religious.

Mr. Plowman: How would that interfere with you sitting as a juror in this case?

Ms. Colby: I am afraid it would.

Mr. Plowman: You are afraid it would?

Ms. Colby: Yes, sir.

Mr. Plowman: Would it interfere with judging the guilt or innocence of the defendant in this case?

Ms. Colby: I think it so.

Mr. Plowman: You think it would?

Ms. Colby: I think it would.

Mr. Plowman: Your Honor, I would move for cause at this point.

The Court: All right. Step down."

(Slip opinion, p. 4806)

Defense counsel did not object to the excusal or seek to ask additional questions, although he did object to the excusal of another juror on Witherspoon grounds. The Florida Supreme Court on direct appeal and the federal district court made factual findings that Colby had clearly established that she would not be impartial on the question of guilt and innocence. The panel disagreed, finding that the use of the word interfere was too broad.

The panel, in addition to the Witherspoon ruling, concluded that Witt was not entitled to habeas relief where nonstatutory aggravating circumstances had been utilized, yet inexplicably vacated the

district court's rejection of Witt's claim on this issue. (Slip opinion, p. 4809).

V. ARGUMENTS AND AUTHORITIES

I.

In reversing the district court and granting habeas corpus relief for the alleged violation of Witherspoon v. Illinois, 391 U.S. 510, 20 L.Ed.2d 776 (1968), the panel decision has rejected without explanation the factual determination of the state courts that juror Colby had made it unmistakably clear that her capital views would prevent her from making an impartial decision as to the defendant's guilt. Witt v. State, 342 So.2d 497, at 499 (Fla. 1977). The United States Supreme Court has repeatedly held that such findings are to be accorded a high degree of deference and that a federal

court may not simply disagree with the state court before rejecting its factual determinations. Sumner v. Mata, 449 U.S. 539, 66 L.Ed.2d 722 (1981); Marshall v. Lonberger, __ U.S. __, 74 L.Ed.2d 646; Maggio v. Fulford, __ U.S. __, 76 L.Ed.2d 794.

In a mild understatement, the panel decision acknowledges, in footnote 11, uncertainty in the circuit over the degree of deference to findings of fact under 28 U.S.C. §2254. In Darden v. Wainwright, 699 F.2d 1031 (11th Cir. 1983), the court observed that trial judges were accorded broad discretion in evaluating juror impartiality and that the state court's factual findings are entitled to a presumption of correctness.[1] See also Judge

[1] In an en banc decision reported at 708 F.2d 646, the district court decision was affirmed. Recently this court granted rehearing.

Kravitch's dissent in McCorquodale v. Balcom, 705 F.2d 1553, at 1561.[2]

In light of the panel's failure to give proper effect to the state court's findings of fact and in light of Judge Roney's concurring opinion admitting doubt as to the soundness of the analysis leading to reversal as well as the correctness of prior circuit decisions (slip opinion at 4809), the court should grant rehearing or rehearing en banc and accept the state court's finding of fact that Ms. Colby made it clear that she could not be impartial on the guilt or innocence issue.

In addition to having improperly rejected the state courts' factual determinations, the panel decision has failed to apply the clearly erroneous rule, Rule 52(a) of the Federal Rules of Civil

[2] McCorquodale is pending en banc.

Procedure, to District Judge Carr's factual finding that Colby had clearly indicated that her personal beliefs against the death penalty would have prevented her from making an impartial decision as to Witt's guilt or innocence (R. 51, pp. 15-16). Cf. Pullman-Standard v. Swint, 456 U.S. 273, 72 L.Ed.2d 66. Accordingly, this court should reconsider its decision and accept Judge Carr's finding.

II.

In footnote 21[3] of Witherspoon, the Supreme Court stated that exclusion for cause is appropriate where it is unmistakably clear:

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[3] Footnote 21 while instructive is not the specific holding of Witherspoon; rather the Court held that veniremen may not be excluded simply for voicing general objections or expressing conscientious or religious scruples against the death penalty.

> ". . . (1) that they would automatically vote against the imposition of capital punishment without regard to any evidence that might be developed at the trial of the case before them, or
>
> (2) that their attitude toward the death penalty would prevent them from making an impartial decision as to the defendant's guilt."

(20 L.Ed.2d at 785)

In Lockett v. Ohio, 438 U.S. 586, 57 L.Ed.2d 973, the Court again noted that it is appropriate for a trial court to excuse for cause those jurors who cannot abide by existing law and to follow conscientiously the instructions of the trial judge. And most recently, Justice White summarized the principle in Adams v. Texas, 448 U.S. 38, 65 L.Ed.2d 581:

> "This line of cases established the general proposition that a juror may not be challenged for cause based on his views about capital punishment unless those

views would prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath. The state may insist however, that jurors will consider and decide the facts impartially and conscientiously apply the law as charged by the court."

(Emphasis supplied) (65 L.Ed.2d at 589)

The panel decision misreads Witherspoon and ignores Lockett and Adams. The specific holding of Witherspoon is that veniremen may not be excluded for cause "simply because they voiced general objections to the death penalty or expressed conscientious or religious scruples against its infliction." 20 L.Ed.2d at 785. Juror Colby did more than voice general objection to the death penalty -- she articulated that she could not be impartial on the question of Witt's guilt or innocence. The panel misapprehends Witherspoon; the panel requires a juror to

be unable to find the defendant guilty:

"Such a response does not indicate an inability, in all cases, to apply the death sentence or to find the defendant guilty where such a finding could lead to capital punishment because it fails to reflect the profundity of any such interference."

(Slip opinion at 4807)

The panel's expansion of Witherspoon is unauthorized by law -- to exclude a juror it is not required that the juror be unable to decide guilt or innocence, only that the juror cannot impartially decide guilt or innocence. Thus, if a juror expresses an ability to decide guilt or innocence but that she would enter the decision-making process other than impartially, Witherspoon would permit excusal and the panel decision would not. Reconsideration of this issue is, therefore, required to maintain uniformity in the law.

Since Colby's views would prevent or substantially impair the performance of her duties as a juror, Witherspoon and Adams permit her excusal. This honorable court should grant rehearing or rehearing en banc in order to correctly apply the Supreme Court decisions. Again, appellee notes Judge Roney's expression of concern for the soundness of the majority's analysis as well as prior Circuit decisions.

In the instant case, the panel holds that the prior decision of Granviel v. Estelle, 655 F.2d 673 (5th Cir. 1981) is not distinguishable:

> ". . . because the court's decision in Granviel turned upon the ambiguity of the venireperson's answers, which were virtually identical to those in this case, and not upon the failure to inquire about the effect of his views on the guilt phase of the trial."
>
> (Slip opinion, p. 4608)

First of all, appellee does not agree that Granviel was correctly decided; Judge Hunter's dissent was more accurate. It is difficult to see the ambiguity of juror Harrison's answer, "No. I could not." 655 F.2d at 684; see also footnote 6, at 691. In any event, the panel decision's claim that Granviel did not turn on the failure to inquire about the effect of the juror's views on the guilt phase is at odds with the very language of Granviel. In explaining why Harrison was improperly excluded under Witherspoon the court compared him to juror Doss in the case of Burns v. Estelle, 626 F.2d 396 (5th Cir. 1980):

> "While Mrs. Doss stated that the possibility of the death penalty would 'affect' her deliberations on any issue of fact, Mr. Harrison made no such representations

> and indeed, was never questioned as to whether his attitude toward the death penalty would prevent him from making an impartial determination as to guilt."

(Emphasis supplied) (Text at 678)

Witherspoon permits excusal for cause if either of the two prongs in footnote 21 is met. In Granviel, the juror was questioned only with respect to prong 1 and in Witt the juror was questioned only with respect to prong 2. The panel decision erroneously concludes that the former controls the latter and ignores the plain language of the earlier case. Rehearing is required.

The record in the instant case establishes prima facie that prospective juror Colby's attitude on capital punishment was more than mere general opposition, that they were such as to prevent or subetantially impair the performance of her duties

as a juror; excusal was proper in light of the defendant's failure to elicit through further questioning that she might properly qualify as an impartial juror.

The panel decision purportedly holds that talismanic responses are not required (Slip opinion, pp. 4808 - 09) but nonetheless holds that the word "interfere" is an improper talisman in the colloquy with Ms. Colby. Defense counsel, of course, used that word in his examination of veniremen Gehm:

> " . . . But you would not let it interfere with your determination?"

(Slip opinion, p. 4805, n. 9)

The court reasons that the word interfere admits of a great variety of interpretations (Slip opinion, p. 4807) but indeed it is difficult to think of a word in the English language which does not. Semantic

games are unnecessary. Both terms "prevent" and "interfere with" mean to hinder or interpose an obstacle to. This court's preoccupation with form over subetance is not required by the Constitution.

III.

Parenthetically, appellee notes that while the panel reaches the correct conclusion that Witt may not obtain federal habeas relief on issue 4 because of Barclay v. Florida, __ U.S. __, 77 L.Ed.2d 235 (1983), incredibly the court orders in the conclusion paragraph at slip opinion p. 4809 that the district court decision on that be vacated. Presumably, this is a misstatement and the court meant to say affirmed.

The panel's less than enthusiastic response to the Barclay decision should be modified sooner rather than later.

Attempting to breathe life into the moribund decision of Goode v. Wainwright, 704 F.2d 593 (11th Cir. 1983), the panel attempts to limit Barclay to a harmless error case when mitigating factors are absent. The real impact of Barclay is that the Constitution is not violated when there is present at least one statutory aggravating factor, the sentence has been reviewed and affirmed by the highest state court and if there is no indication of arbitrariness or capriciousness, federal interference is unwarranted. Bluntly stated, it is not the function of federal courts to resentence, to reweigh or impose their own sense of what the sentence should be.

CONCLUSION

Based on the above and foregoing reasons, arguments and authorities, Appellee

requests a rehearing, or in the alternative, a rehearing en banc.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was sent by U.S. Regular Mail to: William C. McLain, Esquire, Capital Appeals Section, Office of Public Defender, Hall of Justice, 455 North Broadway, Bartow, Florida 33830-3798 this 30th day of September, 1983.

OF COUNSEL FOR APPELLEE

Johnny Paul WITT, Appellant,

v.

STATE of Florida, Appellee.

No. 45796.

Supreme Court of Florida

Feb. 3, 1977.

Defendant was convicted before the Circuit Court, Volusia County, Herboth S. Ryder, J., of murder in first degree, and he appealed. The Supreme Court held that trial court did not err in excluding prospective jurors who stated that they could not return an advisory sentence of death upon weighing of extenuating and mitigating factors of crime or stated that they could not judge guilt or innocence of accused without possible imposition of death penalty interfering with that determination; that defendant knowingly and intelligently waived his privilege against

self-incrimination and his right to counsel; that Supreme Court would not adopt the "irresistible impulse" doctrine as test of competency; and that death sentence imposed upon defendant was not excessive, notwithstanding fact that codefendant was sentenced to life imprisonment, in view of psychiatrists' testimony that 18-year-old codefendant had severe mental or emotional disturbances and was subject to domination by 30-year-old defendant.

Affirmed.

1. Jury 108

It is proper to exclude prospective jurors who state that their reservations about capital punishment would prevent them from making an impartial decision as to defendant's guilt or who say that they could never vote to impose death penalty or that they would refuse even to consider

its imposition in case before them.

2. Jury 108

In prosecution for first-degree murder, trial court did not err in excluding prospective jurors who stated that they could not return an advisory sentence of death upon weighing of extenuating and mitigating factors of crime, or stated that they could not judge the guilt or innocence of accused without possible imposition of death penalty interfering with that determination. West's F.S.A. §921.141(2).

3. Constitutional Law 268.1(1)

Criminal Law 641.4(1)

Right to counsel is among the most important criminal due process rights, but that does not mean that it cannot be voluntarily waived.

4. Criminal Law 412.2(5)

Where defendant was fully advised of

his Miranda rights and requested counsel following his arrest, sheriff's department communicated defendant's request to public defender's office, and two days later, while conversing with detective in his cell, defendant indicated desire to confess and was taken to sheriff's office where he confessed orally and in handwritten account of crime, defendant knowingly and intelligently waived his privilege against self-incrimination and his right to counsel.

5. Criminal Law 50

Supreme Court would not adopt "irresistible impulse" doctrine as test of competency.

6. Homicide 354

Death sentence imposed upon defendant convicted of first-degree murder was not excessive, notwithstanding fact that

codefendant was sentenced to life imprisonment, in view of psychiatrist's testimony that 18-year-old codefendant had severe mental or emotional disturbances and was subject to domination by 30-year-old defendant. West's F.S.A. §921.141(6)(b, e).

Peter F. Behuniak, Tampa, for appellant.

Robert L. Shevin, Atty. Gen., and Raymond L. Marky and Stephen W. Metz, Asst. Attys. Gen., for appellee.

PER CURIAM.

This is a direct appeal from a conviction for murder in the first degree and imposition of the death sentence. We have jurisdiction.[1]

Appellant contends his conviction was

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[1] Art. V, §3(b)(1), Fla.Const.

erroneous (1) because of improper exclusion of prospective jurors, (2) admission of his confession, and (3) an assertion that our rule on competency is outdated. He further contends the imposition of the death penalty was improper under the facts of this case. We affirm the judgment of conviction and the imposition of the death sentence.

On October 20, 1973, the victim of this crime, an eleven-year-old boy, was reported missing by his parents. The circumstances leading up to the boy's death reflect that appellant Johnny Paul Witt and Gary L. Tillman lay in waiting near a road which formed a route between a housing area and nearby convenience store. Witt confessed that Tillman attacked the boy as he came by, striking him on the head with a star bit. With the boy struggling against them, Witt and Tillman

wrestled him to the ground and bound and gagged him. They then placed him into their car trunk and drove to a secluded area. On arrival they discovered the boy was dead. They both apparently committed sexual acts upon his body, and appellant mutilated the boy's body with a knife and left it buried in a shallow grave. An autopsy revealed the boy was strangled to death by the gag. Eight days later the wife of appellant contacted the sheriff's department, informing it that her husband and another man had killed the boy. Appellant Witt was arrested, and two days later confessed to participation with Tillman in the boy's murder.

Appellant Witt was tried by a jury and was convicted of first degree murder. The jury recommended the death sentence, and the trial judge, who later sentenced his codefendant to life imprisonment in

return for the codefendant's tender of a plea of guilty, followed the recommendation and imposed the death sentence.

[1, 2] Appellant Witt contends it was error to exclude for cause prospective jurors who held objections to capital punishment. During voir dire the trial court excluded six prospective jurors who stated they could not return an advisory sentence of death upon the weighing of extenuating and mitigating factors of the crime as required by Section 921.141(2), Florida Statutes, or stated they could not judge the guilt or innocence of the accused without the possible imposition of the death penalty interfering with that determination. It is proper to exclude prospective jurors who "state that their reservations about capital punishment would prevent them from making an impartial decision as to the defendant's guilt.

. . . [or] who say that they could never vote to impose the death penalty or that they would refuse even to consider its imposition in the case before them." Witherspoon v. Illinois, 391 U.S. 510, 513-14, 88 S.Ct. 1770, 1772, 20 L.Ed.2d 776 (1968) (footnote omitted). The statements of the jurors in the instant case constitutionally warranted their exclusion. See, e.g., Portee v. State, 253 So.2d 866 (Fla. 1971).

Appellant next asserts his confession, which was made subsequent to his request for counsel, should have been suppressed for failure of the State to provide proper representation. We disagree. The confession was not coerced, and the appellant voluntarily executed written waiver of counsel prior to making the subject confession.

The record reflects appellant was

fully advised of his rights and requested counsel following his arrest on November 5, 1973. Questioning stopped and the sheriff's department communicated his request to the public defender's office. On November 6, 1973, appellant made his first appearance before a judicial officer with counsel. He contends, however, that he had no opportunity to consult such counsel at the appearance. On November 7, 1973, at 9:30 a.m., he indicated a desire to confess while conversing with a detective in appellant's cell. The conversation was casual, with just one detective, and of no more than a few minutes' duration. Appellant then was taken out of the cell and upstairs to the sheriff's offices where he confessed orally and in a hand-written, thirteen-page account of the crime. Later in the day he drew a map to indicate the

location of the corpse. It is uncontroverted that prior to this confession he was fully advised of his constitutional rights, specifically rejected an offer to consult counsel, and signed a written waiver thereof.

The sole issue is the voluntariness of the confession. The requirements of Miranda are prescribed to ensure voluntariness. The facts in this case are not in dispute as it concerns the written and oral confessions and how they were obtained.

[3] We agree that right to counsel is among the most important crimnal due process rights but that does not mean it cannot be voluntarily waived. In Michigan v. Mosley, 423 U.S. 96, 96 S.Ct. 321, 46 L.Ed.2d 313 (1975), the accused had exercised his right to remain silent during station-house interrogation with respect

to the charge of robbery for which he had been arrested. Two hours later he waived his right to remain silent and his right to consult counsel after renewed Miranda warnings when questioned by a different officer on a separate and unrelated murder charge. During the later questioning he implicated himself in the murder, and his incriminating statement was entered into evidence at trial in which he was convicted. He objected to use of the statement, contending his initial assertion of his right to silence barred its use. The United States Supreme Court held he had voluntarily waived his right to remain silent.

[4] We recognize the majority opinion in Mosley indicates that Miranda places a strict limitation on police interrogation when the right to remain silent and request for counsel is exercised.

In the instant case we feel, as did the majority in Mosley, the circumstances indicate appellant's "'right to cut off questioning' was 'scrupulously honored.'"[2] The law does accord him the opportunity to voluntarily change his mind and confess. Michigan v. Mosley, supra, 423 U.S. 107 - 111, 96 S.Ct. 321, 326 (concurring opinion).

We hold the heavy burden of demonstrating that the defendant knowingly and intelligently waived his privilege against self-incrimination and his right to counsel, and then voluntarily confessed, was met under the circumstances in this case. No contention has been made of coercive or overbearing State conduct.

[5] Appellant lastly argues the application of our test for competency to

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2 Id. at 104, 96 S.Ct. at 326.

his case is outdated, and a test should be established more in tune to modern psychiatry. The evidence presented in this cause reflects the appellant was properly found competent at the time of the offense. We reject the "irresistible impulse" doctrine asserted by the appellant. See Anderson v. State, 276 So.2d 17 (Fla. 1973); Van Eaton v. State, 205 So.2d 298 (Fla. 1967); Piccott v. State, 116 So.2d 626 (Fla. 1959).

[6] Our final and most difficult responsibility is to review the imposition of the death penalty and determine if it may be properly imposed in this case. Subsequent to appellant Witt being sentenced to death in February, 1974, the codefendant Gary Tillman on May 6, 1974, entered and had accepted by the same trial court, in a separate trial, a plea of guilty conditioned upon life imprisonment.

The plea agreement was presented by the public defender and the state's attorney and agreed to by defendant Tillman after extensive inquiry by the trial judge. The case was appealed to the Second District Court of Appeal on other grounds and affirmed per curiam. Tillman v. State, 304 So.2d 161 (Fla. 2 DCA 1974).

Under these circumstances we cannot judicially ignore the discretionary inconsistency in the life sentence given appellant's codefendant Tillman in his severed proceeding. The trial judge agreed to sentence Tillman to life imprisonment in exchange for Tillman's plea of guilty following a determination of competency to stand trial, yet the facts in this case on their face appear to justify the imposition of the death sentence for both the appellant and the codefendant.

After carefully reviewing the records

of the two proceedings, we hold the facts and circumstances support the imposition of the death penalty on the appellant Witt and a life sentence for Tillman. Testimony of five psychiatrists who examined Tillman indicated Tillman had a severe mental or emotional disturbance and was subject to domination by Witt. Witt's dominance was enhanced by his age of thirty years, compared to Tillman's age of eighteen. These factors correspond to the provisions of Section 921.141(6)(b) and (e), Florida Statutes (1975), and constitute sufficient mitigation with respect to Tillman's participation to justify a life sentence for Tillman and a death sentence for Witt for this otherwise aggravated murder.

Appellant's conviction and sentence are affirmed.

OVERTON, C.J., and ADKINS, BOYD, ENGLAND, SUNDBERG, ROBERTS (Retired), and DREW (Retired), JJ., concur.

EXCERPTS OF JURY VOIR DIRE

1. Juror Colby JA 139-142

2. Juror Kazmierczak JA 143-148

3. Juror Gehm JA 149-152

4. Juror Davis JA 153-154

5. Juror Miller JA 155-157

6. Juror Baket (Eleven) JA 158-160

7. Juror Hill JA 160-164

MR. FLOWMAN: Okay. Now, during the second stage of the proceedings, we have a chance to present certain aggravating circumstances and certain mitigating circumstances; and after you have heard those aggravating and mitigating circumstances, you go back into the jury room and vote again.

This time if seven of you, the majority of you, feel one way, life imprisonment or the death penalty, then you come back into the jury room, or into the courtroom and announce your verdict to the Court. So the first verdict is a unanimous verdict. We all think the Defendant is guilty of first-degree murder. Then we go into the second stage.

The second stage of the proceeding considers aggravating and mitigating circumstances, and at that point, seven of you must agree one way or the other.

either life in prison, or the death penalty. And as soon as that agreement has been made, as soon as your deliberations are final, then you come back into the courtroom.

Now, your verdict at this point is given to the Court, Judge Ryder, and Judge Ryder will consider that as an advisory opinion. As an advisory opinion. In effect, you are telling the judge: We have considered the facts, we have considered the law and all of the aggravating and mitigating circumstances in the case, and we feel that the appropriate penalty is the death penalty, or we think the appropriate penalty is life in prison.

At that point, Judge Ryder will then consider your verdict as to the punishment and will then consider it, review it, and decide whether he will follow your verdict, whatever it might be, or whether he

will not follow your verdict.

The Judge is the final person to determine what the Defendant is sentenced to. Do each of you understand that?

Now, let me ask you a question, ma'am. Do you have any religious beliefs or personal beliefs against the death penalty?

JUROR NUMBER ONE: I am afraid personally but not --

MR. FLOWMAN: Speak up, please.

JUROR NUMBER ONE: I am afraid of being a little personal, but definitely not religious.

MR. FLOWMAN: Now, would that interfere with you sitting as a juror in this case?

JUROR NUMBER ONE: I am afraid it would.

MR. FLOWMAN: You are afraid it would?

JUROR NUMBER ONE: Yes, sir.

MR. PLOWMAN: Would it interfere with judging the guilt or innocence of the Defendant in this case?

JUROR NUMBER ONE: I think so.

MR. PLOWMAN: You think it would?

JUROR NUMBER ONE: I think it would.

MR. PLOWMAN: Your Honor, I would move for cause at this point.

THE COURT: All right. Step down.

MR. PLOWMAN: Step down, ma'am.

(Evelyn R. Colby, Juror Number One, was excused.)

THE CLERK: Margaret Kazmierczak, please take the vacant seat in the jury box.

MR. PLOWMAN: Is that Mrs. Kazmierczak?

(SR 503-506)

JUROR NUMBER ONE: I don't believe in the death penalty if that would be of any effect, if that has anything to do with it.

MR. PLOWMAN: Yes, it does, because the death penalty is a possibility regarding the sentencing in this particular case. Now, you say you do not believe in the death penalty?

JUROR NUMBER ONE: No.

MR. PLOWMAN: Okay. Would that interfere with sitting in this particular case and judging guilt or innocence?

JUROR NUMBER ONE: No, it wouldn't interfere.

MR. PLOWMAN: Okay. Now, are you saying that regardless of the facts and regardless of the law that you would not be able to follow the law regarding the death penalty.

JUROR NUMBER ONE: If it must be a

death penalty, I don't think I could go along with that.

MR. PLOWMAN: Well, let me explain it this way. When you are called to hear the case, you will hear the facts of the case as I pointed out to you. You will hear the events that took place on October 28, 1973 and those events that transpired in the next week and a half or so subsequent to that.

Now, when you hear all that testimony, you will be sitting here as a juror in the case but you also have to sit in judgment regarding the penalty that would be imposed.

Now, this Court will tell you that this is not just a feeling that you get. You just don't go back and you get a feeling, "I think this is the death penalty, or I think this is life in prison."

The court will tell you and will outline for you what facts can be considered as aggravating circumstances. If you find that these aggravating circumstances are present in this case, then you are to consider those aggravating circumstances in your final judgment of sentence.

He will also give you a list of mitigating circumstances, some things that are in his favor that mitigate, that lessen the sentence in the case. He will outline those for you, and he'll give you the law.

I believe the Court will tell you that after listening to the aggravating circumstances on one side and the mitigating circumstances on the other side if the aggravating outweigh the mitigating, then it is your duty to come back with the death penalty.

The Legislature has set it out specifically, those points that are pertinent for a jury to consider when determining the death penalty.

Now, if you heard the evidence in the case and if you heard all the questions and all the answers and all the facts in the case and also all of the questions and answers during the second stage of the proceedings and you went back and you said, yes, we have one, two, three, four, or whatever, number of aggravating circumstances and on this side we've got, say, one or two, in any event the aggravating outweighing the mitigating, is your feeling about the death penalty so strong that you would not be able to come back with a death penalty verdict?

JUROR NUMBER ONE: Yes, it is that strong.

MR. FLOWMAN: Okay. Now, if your

feeling is that strong, I am sure that it would have to interfere in some way with your consideration of the case when you hear the case, when you hear the facts of the case, guilt and innocence of the particular Defendant.

Do you think that you would be either prejudiced or sympathetic toward the Defendant?

JUROR NUMBER ONE: I don't think it would interfere with the guilt or innocence of the person, but the decision of what guilt and what the outcome would be for his destiny, I could not go along with the death penalty. (SR 509-512)

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MR. BEHUNIAK: That's all I have.

MR. FLOWMAN: Judge, at this time the State would move that the Court excuse for cause Ms. Kazmierczak, Juror Number One.

THE COURT: All right.

MR. BEHUNIAK: I object to that, Your Honor.

THE COURT: Wait a minute, ma'am. I haven't made my mind up yet. Just have a seat. Let me ask you these things. Do you have any prefixed ideas about this case at all?

JUROR NUMBER ONE: Not at all.

THE COURT: Will you follow the law that I give you?

JUROR NUMBER ONE: I could do that.

THE COURT: What I am concerned about is that you indicated that you have a state of mind that might make you be unable to follow the law of this State.

JUROR NUMBER ONE: I could not bring back a death penalty."

THE COURT: Step down.

(Juror Number One, Margaret Kazmierczak was excused.) (SR 580)

MR. FLONNAN: And the Court will tell you that. It's not to be dealt with lightly. If you put it on one side and you put it on the other and the scale balances out evenly, then your duty as a citizen is to come back with life in prison.

That is what I would want you to do, and that is what the Court would want you to do, but I am asking you if you consider that and those aggravating circumstances are there, would be able to follow that and come back with a death penalty conviction?

JUROR NUMBER THREE: Yes, sir.

MR. FLONNAN: How about you, sir?

JUROR NUMBER FIVE: I am afraid not, sir.

MR. FLONNAN: You would not be able to do so?

JUROR NUMBER FIVE. My religious convictions would be foremost in my mind up to this point and possibly beyond that.

MR. PLOWMAN: Okay.

JUROR NUMBER FIVE: I am afraid I would be unable to. (SR 514)

* * * *

MR. BEHUNIAK: Mr. Gahm, could you do that:

JUROR NUMBER FIVE: What is the question?

MR. BEHUNIAK: Did you hear my questions that I asked Mr. Lefils?

JUROR NUMBER FIVE: Let me hear it again.

MR. BEHUNIAK: I am saying if you were to return a verdict of guilty of first-degree murder, could you keep an open mind as to whether you should vote for the death penalty or life?

JUROR NUMBER FIVE: No, I could not.

MR. BEHUNIAK: Why is that, sir?

JUROR NUMBER FIVE: I feel that the Almighty is the judge of life or death.

MR. BEHUNIAK: That's right. You said that previously. But you would not let it interfere with your determinations?

JUROR NUMBER FIVE: I am afraid that it would be weighing on my mind during the trial.

THE COURT: Do you think that this state of mind will prevent you from acting with impartiality? Do you feel that the state of mind that you have will prevent you from acting with impartiality?

What I am saying is - -

JUROR NUMBER FIVE: I am afraid it might, sir.

THE COURT: You are afraid so?

JUROR NUMBER FIVE: I am afraid it might, sir.

THE COURT: Okay. Step down.

JUROR NUMBER FIVE: Yes, sir.

(Juror Number Five, Edward G. Gehm, was excused.) (SR 535-536)

MR. PLOWMAN: Mrs. Davis, we talked earlier, and you expressed some reluctance regarding the sentence.

JUROR NUMBER SEVEN: Yes.

MR. PLOWMAN: Now, you have heard a lot of things since then --

JUROR NUMBER SEVEN: Yes.

MR. PLOWMAN: -- and I know that it's hard, it's not easy for anybody here. It's going to be hard for everybody, but could you follow the law?

JUROR NUMBER SEVEN: I can follow the law, but I couldn't bring back a death penalty.

MR. PLOWMAN: Regardless of what the law says?

JUROR NUMBER SEVEN: That's right.

MR. PLOWMAN: You just couldn't do that?

JUROR NUMBER SEVEN: I couldn't do that, really.

MR. PLOWMAN: If your feeling are that way, then, of course, it would interfere with your entire deliberation in the case. You are thinking that right now?

JUROR NUMBER SEVEN: Yes, sir.

MR. PLOWMAN: You are going to be thinking that through the first stage of the trial, is that correct?

JUROR NUMBER SEVEN: That's right.

MR. PLOWMAN: And you couldn't follow the law even if the Court gives it to you?

JUROR NUMBER SEVEN: I couldn't bring back a death penalty on anyone's life. That's just the way I feel.

MR. PLOWMAN: Okay. I appreciate that response.

Your Honor, I would move the Court to have Mrs. Davis excused for cause.

THE COURT: Step down.

(Juror Number Seven, Pauline Davis, was excused.) (SR 590-592)

MR. PLOWMAN: Have you been in the courtroom all morning while we have been asking questions?

JUROR NUMBER SEVEN: All the morning.

MR. PLOWMAN: Okay. You heard the comments that I made?

JUROR NUMBER SEVEN: That's right.

MR. PLOWMAN: And the responses, and so forth, of the other members of the jury?

JUROR NUMBER SEVEN: That's right.

MR. PLOWMAN: Okay. Would your responses have been any different than those given by the other members here? Would your answers have been any different?

JUROR NUMBER SEVEN: No. As far as I can remember, no.

MR. PLOWMAN: Okay. Did you hear the discussion that we have had just recently

with Mrs. Davis regarding the death penalty?

JUROR NUMBER SEVEN: That's right.

MR. PLOWMAN: Okay. Do you have any strong feelings one way or the other regarding the death penalty?

JUROR NUMBER SEVEN: Well, I just couldn't bring a -- I couldn't vote, I guess, well, I am against the death penalty.

MR. PLOWMAN: You are against the death penalty. Would that interfere with your determination in this case?

JUROR NUMBER SEVEN: I think it would.

MR. PLOWMAN: Okay. And you wouldn't be able to follow the law as instructed by the Court?

JUROR NUMBER SEVEN: When it comes down to a death penalty, I wouldn't.

MR. PLOWMAN: You could not do it. Okay. Regardless of the law?

JUROR NUMBER SEVEN: No, sir.

MR. PLOWMAN: Okay. Your Honor, the State would move the Court to excuse Mr. Miller for cause.

THE COURT: Do you feel because of your state of mind regarding that particular situation it would make you unable to render a just and fair verdict in this case?

JUROR NUMBER SEVEN: I am against the death verdict. I think it would.

THE COURT: Step down.

(SR 594-596)

JUROR NUMBER ELEVEN: I would have to hear the merits of the case. I don't believe in the death penalty, but I would have to hear the evidence and weigh it.

MR. PLOWMAN: Well, do you think there are appropriate cases for the death penalty?

JUROR NUMBER ELEVEN: I believe there are at times, yes.

MR. PLOWMAN: Okay. Do you feel that if the Legislature set out these certain points to consider --

JUROR NUMBER ELEVEN: If clearly defined and followed, I would be able to do that.

MR. PLOWMAN: Do you recognize the point right now that I am getting ready to ask, that maybe your aggravating circumstances might not be the same as the Legislature's?

JUROR NUMBER ELEVEN: True. I might feel that way and not be in accord with the Legislature's definition.

MR. PLOWMAN: Now, at this point there is a very important question, and I want you to think on it. This goes through the entire trial. This is why we have laymen coming in and hearing the caes, and so forth, and judging guilt or innocence.

The jury's duty is to make findings of fact as opposed to findings of law, and we are not supposed to quarrel with that. We are supposed to follow the law, whatever the Court gives us. You can discuss the facts, what happened, that kind of thing; but when the Court gives you the instructions on the law, you are to take the law as he gives it to you and not say I don't believe in that, so I will forget that, and I believe in this and I will

take that, and I don't believe in this, so I will disregard it.

Do you understand when the Court gives you the law, you are to take the entire law and apply it to the facts? Could you do that when we are talking about the death penalty?

JUROR NUMBER ELEVEN: Not having done it before in a criminal case, I am not positive I would be able to follow it exactly but I would try. (SR 516-517)

MR. PLOWMAN: Mrs. Hill, let me go back to the same point. Do you think at this point that your feeling regarding the death penalty would prohibit you from rendering a true and just verdict in the case, fair to the State and fair to the Defendant?

JUROR NUMBER TWELVE: Well, I would want to be fair, but I don't think I could render a verdict of the death penalty.

THE COURT: Ask her to speak up. She is answering you; and I can't hear.

MR. PLOWMAN: The response was you don't think you could render a death penalty verdict; is that correct?

JUROR NUMBER TWELVE: Yes.

MR. PLOWMAN: Okay. Irrespective of what the law would show regarding the aggravating and mitigating circumstances?

JUROR NUMBER TWELVE: I couldn't do it.

MR. PLOWMAN: Okay. Judge, the State would move that the Court excuse Mrs. Hill for cause.

THE COURT: So what you are saying is you have prefixed ideas about this case; is that right, ma'am?

JUROR NUMBER TWELVE: Well, I would want to be fair and do justice. but I don't think I could.

THE COURT: I can't hear you.

JUROR NUMBER TWELVE: I just don't believe that I could condemn anybody to a death sentence.

THE COURT: Well, ma'am, what I am interested about is whether or not you will render a fair and impartial verdict, whether you have any prefixed ideas about this case, and whether you will follow the law. That's the whole shebang right there.

JUROR NUMBER TWELVE: I would give a true verdict. I mean, I wouldn't -- I can do that.

THE COURT: Well, from what you are saying, I have some concern. Will you follow the law in this case?

JUROR NUMBER TWELVE: Pardon?

THE COURT: Will you follow the law in this case?

JUROR NUMBER TWELVE: Yes, unless it was that I had to give a death sentence. I couldn't do that.

MR. PLOWMAN: In other words, Mrs. Hill, if it came out that the aggravation in this case outweighed any mitigation, even though the law in that situation would tell you that you were to return a death penalty verdict, you could not do that in that situation?

JUROR NUMBER TWELVE. No.

MR. PLOWMAN: You could not follow the law in that situation?

JUROR NUMBER TWELVE: Not in that situation, no.

MR. BEHUNIAK: I didn't hear that. I didn't hear that last answer.

MR. PLOWMAN: You would not be able to follow the law regarding the death penalty in the event that the aggravation outweighed the mitigation in the case. Is that what you are saying?

JUROR NUMBER TWELVE: Yes.

MR. PLOWMAN: The State would renew its request.

THE COURT: Step down, ma'am.

(Juror Number Twelve, Mrs. Hill, was excused.)

(SR 609-612)

PETITIONER'S

BRIEF

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1983

CASE NO. 83-1427

LOUIE L. WAINWRIGHT, Secretary,
Department of Corrections,
State of Florida,

Petitioner,

vs.

JOHNNY PAUL WITT

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

BRIEF OF PETITIONER ON THE MERITS

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QUESTIONS PRESENTED

I. Whether the lower court erred in failing to apply the presumption of correctness required by 28 U. S. C. §2254(d) to the state court's factual finding that prospective juror Colby clearly expressed her inability to decide respondent's guilt or innocence because of her capital punishment views?

II. Whether the lower court erred in overturning the District Court's juror excusal ruling when it was not clearly erroneous, thereby violating Rule 52(a), Federal Rules of Civil Procedure?

III. Whether the lower court erroneously applied Witherspoon v. Illinois, 391 U.S. 510 (1968) and Adams v. Texas, 448 U.S. 38 (1980) yielding inconsistent results with other decisions and requiring the exercise of this Court's supervisory review?

IV. Whether consistently with Witherspoon v. Illinois, 391 U.S. 510 (1968) and its progeny, a trial judge may excuse a prospective juror who fails to provide assurance that she can perform her duties as a juror in impartially deciding the accused's guilt or innocence.

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PREFACE

The following references are made herein:

(JA) for the Joint Appendix, consisting of JA-1 - 164.

(R) for the record on appeal from the United States District Court to the Eleventh Circuit Court of Appeals.

(SR) for the State court record.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eleventh Circuit is reported at Witt v. Wainwright, 714 F.2d 1069 (11th Cir. 1983) and appears in the Joint Appendix as JA-4 through JA-57. The opinion of the United States District Court for the Middle District of Florida is unreported and appears at JA-58 through JA-98.

The opinion of the Supreme Court of Florida is reported at Witt v. State, 342 So.2d 497 (Fla. 1977) and is printed in the Joint Appendix at JA-121 through JA-137.

JURISDICTION

On September 16, 1983, the United States Court of Appeals for the Eleventh Circuit reversed the United States District Court's denial of Respondent's Petition for a Writ of Habeas Corpus. Petitioner Wainwright filed a Petition for Rehearing and suggestion for Rehearing En Banc. On January 4, 1984, the Court amended its opinion and denied rehearing.

The jurisdiction of this Honorable Court is invoked pursuant to Title 28 U. S. C. §1254(1) and Rule 17 of the Rules of the Supreme Court.

III. CONSTITUTIONAL AND STATUTORY PROVISIONS

The Sixth Amendment to the United States Constitution provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature of cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

The Fourteenth Amendment to the United States Constitution provides, in pertinent part:

> SECTION 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor

> shall any State deprive any person of life, liberty, or property, wihtout due process of law; nor deny to any person within its jurisdicton the equal protection of the law.

28 U.S.C. §2254(d) provides:

> (d) In any proceeding instituted in a Federal court by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination after a hearing on the merits of a factual issue, made by a State court of competent jurisdiction in a proceeding to which the applicant for the writ and the State or an officer or agent thereof were parties, evidenced by a written finding, written opinion, or other reliable and adequate written indicia, shall be presumed to be correct, unless the applicant shall establish or it shall otherwise appear, or the respondent shall admit --
>
> (1) that the merits of the factual dispute were not resolved in the State court hearing;
>
> (2) that the factfinding procedure employed by the State court was not adequate to afford a full and fair hearing;

(3) that the material facts were not adequately developed at the State court hearing;

(4) that the State court lacked jurisdiction of the subject matter or over the person of the applicant in the State court proceeding;

(5) that the applicant was an indigent and the State court, in deprivation of his constitutional right, failed to appoint counsel to represent him in the State court proceeding;

(6) that the applicant did not receive a full, fair, and adequate hearing in the State court proceeding; or

(7) that the applicant was otherwise denied due process of law in the State court proceeding;

(8) or unless that part of the record of the State court proceeding in which the determination of such factual issue was made, pertinent to a determination of the sufficiency of the evidence to support such factual determination, is produced as provided for hereinafter, and the Federal court

on a consideration of such part of the record as a whole concludes that such factual determination is not fairly supported by the record:

And in an evidentiary hearing in the proceeding in the Federal court, when due proof of such factual determination has been made, unless the existence of one or more of the circumstances respectively set forth in paragraphs numbered (1) to (7), inclusive, is shown by the applicant, otherwise appears, or is admitted by the respondent, or unless the court concludes pursuant to the provisions of paragraph numbered (8) that the record in the State court proceeding, considered as a whole, does not fairly support such factual determination, the burden shall rest upon the applicant to establish by convincing evidence that the factual determination by the State court was erroneous.

STATEMENT OF THE CASE

Respondent Johnny Paul Witt and an accomplice, Gary Tillman, killed eleven year old Jonathan Kushner in October of 1973. The victim, who had ridden by on his bicycle at a spot where Witt and Tillman lay in wait, was struck on the head with a star bit, gagged and transported in a car trunk to a secluded area. Discovering that the boy was dead from suffocation, they committed sexual acts upon and mutilated the body. Witt was arrested and confessed to participation in the Kushner murder. Witt was convicted of first degree murder and sentenced to death and the Florida Supreme Court affirmed the judgment and sentence. Witt v. State, 342 So.2d 497 (Fla. 1977). This Court denied his certiorari petition. Witt v. Florida, 434 U.S. 935 (1977). Respondent moved to

set aside the judgment which motion was denied by the trial court. The Florida Supreme Court affirmed that ruling. Witt v. State, 387 So.2d 922 (Fla. 1980) and this Court again denied certiorari review. Witt v. Florida, 449 U.S. 1067 (1980).

Respondent Witt sought federal habeas corpus relief on multiple grounds including an assertion that there had been a violation of Witherspoon v. Illinois, 391 U.S. 510 (1968). The United States District Judge George Carr denied the habeas petition in its entirety in an order entered May 14, 1981.[1] (JA 58 - 98)

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[1] On June 7, 1981, Judge Carr entered another Memorandum Opinion and Order denying habeas relief following an evidentiary hearing concerning the applicability of the then-recent decisions of Estelle v. Smith 451 U.S. 454 (1981) and Edwards v. Arizona, 451 U.S. 477 (1981) (R 68) The lower court affirmed Judge Carr in that ruling and it is not now before the Court. It should be noted that the opinion of the lower court erroneously recited that an evidentiary hearing was held on the Witherspoon claim. 714 F.2d 1069, at 1071.

As to the Witherspoon claim Judge Carr found juror Colby's responses clearly indicated that her personal beliefs against the death penalty would have prevented her from making an impartial decision as to Witt's guilt or innocence and that the State's presumptively correct factual determination should stand pursuant to Sumner v. Mata, 449 U.S. 539 (1981). (R 68, pp. 15 - 16); (JA 93 - 94)

On appeal, the lower court rejected all of Witt's claims for habeas corpus relief except the Witherspoon claim. The court limited its consideration to the dismissal of one juror, Ms. Colby, noting in footnote eight (8) that consideration of responses of jurors Gehm and Miller who were less ambiguous was unnecessary. 714 F.2d at 1081 (JA 41 - 46). The voir dire leading to juror Colby's dismissal included the following:

"Mr. Plowman [for the State]: Now, let me ask you a question, ma'am. Do you have any religious beliefs or personal beliefs against the death penalty?

Ms. Colby: I am afraid personally but not --

Mr. Plowman: Speak up, please.

Ms. Colby: I am afraid of being a little personal, but definitely not religious.

Mr. Plowman: Now, would that interfere with you sitting as a juror in this case?

Ms. Colby: I am afraid it would.

Mr. Plowman: You are afraid it would?

Ms. Colby: Yes, sir.

Mr. Plowman: Would it interfere with judging the guilt or innocence of the defendant in this case?

Ms. Colby: I think so.

Mr. Plowman: You think it would?

Ms. Colby: I think it would.

Mr. Plowman: Your Honor, I

would move for cause at this point.

THE COURT: All right. Step down."

(714 F.2d at 1082)

Trial counsel neither objected to the excusal of Mrs. Colby, nor did he attempt to seek to qualify her by further examination of her capital punishment views, although he did object to the excusal of another juror Kazmierczak. (JA 147)

The lower court, disagreeing with both the Florida Supreme Court and the United States District Judge, held that excusal of juror Colby was improper under Witherspoon v. Illinois, 391 U.S. 510 (1968); in the court's view, that juror did not adequately express her unwillingness to impartially decide respondent's guilt or innocence.

SUMMARY OF THE ARGUMENT

I. The state courts made a factual determination that juror Colby expressed an unwillingness or inability to perform an essential function of a juror - to impartially decide the guilt or innocence of the defendant Witt - because of her capital punishment views. The federal Court of Appeals failed to pay deference to this finding and did not adequately explain its reason for failing to do so. See Sumner v. Mata, 449 U.S. 539 (1981); Marshall v. Lonberger, ___ U.S. ___, 74 L.Ed.2d 646 (1982); Maggio v. Fulford, ___ U.S. ___, 76 L.Ed. 2d 794 (1982); Rushen v. Spain, ___ U.S. ___, 78 L.Ed.2d 267 (1983); Wainwright v. Goode, ___ U. S. ___, 78 L.Ed.2d 197 (1983). Since the trial judge did not apply an erroneous legal standard and the facts adequately

support the legal conclusion reached and respondent was not denied an opportunity in the state court to demonstrate that the juror was qualified to sit, the federal Court of Appeals should not have substituted its judgment on a factual determination for that of the state court. Application of 28 U.S.C. §2254(d) to Witherspoon matters promotes federalism and comity, promotes the idea that the trial is the main event rather than a preliminary round and recognizes the vital and unique role of the trial judge to observe that which cannot be recorded on the printed page.

II. The federal District Court, upon review of the record in respondent's application for habeas corpus relief, found that juror Colby had made it clear that her capital punishment views would prevent her from impartially deciding the

guilt or innocence of the accused. Judge Carr's factual finding should have been accepted as it was not clearly erroneous. Rule 52(a), Federal Rules of Civil Procedure; Pulman-Standard v. Swint, 456 U. S. 273 (1982).

III. Use of the exact terminology of footnote 21 of Witherspoon v. Illinois, 391 U.S. 570 (1966) is not a prerequisite to excusal for cause. So long as a juror clearly indicates that her capital views would prevent or substantially impair the performance of the duties as a juror to follow the instructions given by the trial judge, excusal is appropriate. Lockett v. Ohio, 438 U.S. 586 (1978); Adams v. Texas, 448 U.S. 38 (1980). A juror who admits her capital views would interfere with deciding guilt or innocence impartially cannot follow the law because such an

attitude prevents her from being impartial in that essential duty.

IV. The state has a right to an impartial jury. Hayes v. Missouri, 120 U.S. 68 (1983); Adams v. Texas, supra. An impartial jury is composed of those who are willing to decide the guilt or innocence of the accused based on the evidence presented and the trial judge's instructions on the applicable law. An impartial jury is one willing to consider the applicability of the ultimate sanction, the death penalty, in a given case and an impartial jury embraces one that is willing to satisfy the trial judge it can meet these conditions. Any individual who will not give such assurances to the trial judge may be excused for cause, irrespective of the language employed in the voir dire examination.

I

ARGUMENT

As the Court is aware, attempts by the lower courts faithfully to apply the precepts of Witherspoon v. Illinois, 391 U.S. 510 (1968) and succeeding decisions have led to inconsistent results. In dissenting to the denial of a certiorari petition, Justice Rehnquist joined by the Chief Justice and Justice O'Connor characterized the result as "Near chaos throughout the state and federal appellate courts" and the same disarray exists in federal courts sustaining petitions for writs of habeas corpus. Texas v. Mead, __ U.S. __, 79 L.Ed.2d 714, at 717 - 718.

No useful purpose would be advanced merely by repeating that which is well-known. Petitioner proposes that this Court adopt 28 U.S.C. §2254(d) as the

standard of review by the federal courts in evaluating Witherspoon claims in collateral attacks. As explained in Sumner v. Mata, 449 U.S. 539 (1981) federal habeas has been a source of friction between the state and federal courts and Congress intended to alleviate that friction in 1966 when it enacted subsection (d) to the habeas corpus act. 449 U.S. at 550. In addition to minimizing the friction between the state and federal courts, the limited nature of §2254 review serves the interest that both society and the individual criminal defendants have in insuring that at some point in time there will be an end to litigation. 449 U.S. at 550, fn. 3. Sumner held that the federal appellate court had failed to explain its reason for concluding that the state finding was not fairly supported by the record on a photographic identification issue.

After Sumner, this Court decided a number of cases reinforcing the premise that second-guessing of state court fact finding was to be discouraged. Smith v. Phillips, 455 U.S. 209 (1982); Marshall v. Lonberger, __ U.S. __, 74 L.Ed.2d 646 (1983); Maggio v. Fulford, __ U.S. __, 76 L.Ed.2d 794 (1983); Wainwright v. Goode, _ U.S. __, 78 L.Ed.2d 187 (1983); Rushen v. Spain, __ U.S. _, 78 L.Ed.2d 267 (1983). In Smith the trial judge held a hearing and concluded that a juror's applying for employment with the prosecutor during the trial did not impair his ability to render an impartial verdict. 455 U.S. at 220.[1] In Marshall, this Court

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[1] This Court overturned the federal courts' grant of the writ, holding that it was error to imply juror bias and the prosecutor's failure to disclose the job application did not deprive the defendant of a fair trial guaranteed by the Due Process Clause.

held that the federal courts failed to accord sufficient respect to the state courts' determination on the issue of voluntariness of the defendant's plea. In Maggio, this Court summarily reversed a federal court ruling that had substituted its judgment on the credibility of witnesses for that of the state courts on the issue of defendant's competency.

In Goode, supra, the Florida Supreme Court had concluded from a review of the sentencing proceeding that the trial judge had not relied on the factor of the defendant's future dangerousness. This Court found that factual conclusion fairly supported by the record; even though the opposite conclusion also found fair support in the record the federal Court of Appeals erred in substituting its view of the facts for that of the state court. 78 L.Ed.2d at 193. In Rushen, the federal

courts erred in rejecting the state court finding that an ex parte communication between the trial judge and a juror was harmless error:

> "The substance of the ex parte communications and their effect on juror impartiality are questions of historical fact entitled to this presumption. Thus, they must be determined , in the first instance, by state courts and deferred to, in the absence of convincing evidence to the contrary by the federal courts. See Marshall v. Lonberger, U.S. , at , 74 L.Ed.2d 646, 103 S.Ct. 843 (1983). Here, both the state's trial and appellate courts concluded that the jury's deliberations, as a whole, were not biased. This finding of fact - on a question the state courts were in a far better position than the federal courts to answer - deserve a "high measure of deference," Sumner v. Mata, 455 U.S. 591, 598, 71 L.Ed.2d 480, 102 S.Ct. 1303 (1982), and may be set aside only if it lack[s] even a fair support in the record. Marshall v. Lonberger, supra, U.S. at , 74 L.Ed.2d 646, 103 S.Ct. 843."

(78 L.Ed.2d at 274)

All of these decisions powerfully reinforce the concept that the state judges can and are to be entrusted to perform their judicial functions in a responsible manner; like their federal counterparts, state judges carry an obligation to enforce the Constitution. Stone v. Powell, 428 U.S. 465 (1976), fn. 35; Sumner v. Mata, 449 U.S. at 549.

In non-Witherspoon contexts, the Court has stressed that bias on the part of a particular juror is a question of historical fact. Rushen v. Spain, supra; Smith v. Phillips, supra. Trial judges have been invested with broad discretion in rulings on challenges for bias. Dennis v. United States, 339 U.S. 162 (1950); Reynolds v. United States, 98 U.S. 145 (1878). It must be conceded, however, that the language in the decisions of this Court has not been totally free of

conflict. For example, in Irvin v. Dowd, 366 U.S. 717 (1960), decided prior to the congressional adoption of section (d) to 28 U.S.C. §2254, the Court cited Reynolds and declared that the issue of juror impartiality was a mixed question of law and fact requiring independent evaluation of the facts. While Reynolds does mention that juror impartiality is a question of mixed law and fact that opinion also adds:

> "In considering such questions in a reviewing court, we ought not to be unmindful of the fact we have so often observed in our experience, that jurors not unfrequently seek to excuse themselves on the ground of having formed an opinion, when on examination, it turns out that no real disqualification exists. In such cases the manner of the juror while testifying is oftentimes more indicative of the real character of his opinion than his words. That is seen below but cannot always be spread upon the record. Care should, therefore, be taken in the reviewing court not to reverse the ruling below upon such

a question of fact, except in a clear case."

(emphasis supplied) (25 L.Ed. 240 at 247) Reynolds consequently cannot be viewed as simply representing the thought that a reviewing court may ignore and provide no deference to the findings of the trial court. To the extent it suggested otherwise, Irvin v. Dowd, supra, must be deemed supplanted by Smith v. Phillips and Rushen v. Spain. Determinations of juror bias are factual matters. Similarly, the determination of a veniremen's state of mind, his ability vel non to follow the law as instructed by the trial court in light of his capital views is a factual matter indistinguishable from the other kinds of determination dealing with mental processes entrusted to the state courts. (e.g. the judge's non consideration of

future dangerousness in Goode; the voluntariness of a guilty plea in Marshall; the mental competency of the accused in Maggio).

Despite the stated Congressional policy enforced by this Court's recent decisions, Respondent may urge that the present practice of permitting the federal court to engage in independent de novo review with no deference accorded the state court findings is preferable either because the federal courts are more competent in evaluating Witherspoon claims or because at the very least there will be assured consistency in the applications. As to the first reason, inferior federal courts do not have greater competence. Both state and federal judges are committed to fidelity to the Constitution. Sumner v. Mata, 449 U.S. at 549; Stone v. Powell, 428 U.S. 465, at 493 fn. 35. An

argument of greater consistency is more illusory than real as a cursory review of the decisions demonstrates. For example, compare the voir dire colloquy in Granviel v. Estelle, 655 F.2d 673 (5th Cir. 1981) with that in Collins v. Francis, 728 F.2d 1322 (11th Cir. 1984). In the former case juror Harrison was deemed improperly excused in this exchange:

> "Q. Let me ask you if you personally sitting as a juror, could ever vote so as to inflict the death penalty?
>
> A. No, I don't think I could.
>
> Q. That is a definite prejudice or feeling that you have that you would not change? You just don't feel like you would be entitled to take another person's life in that fashion.
>
> A. (Venizuman nods.)
>
> Q. Okay, you could not?
>
> A. No, I could not.
>
> (655 F.2d at 684)

Dissenting Judge Hunter thought Harrison's message against capital punishment was "Loud and clear" 655 F.2d at 690. In Collins, in contrast, a panel unanimously approved an excusal based on this dialogue:

> THE COURT: I think Mrs. Gurr, as I understand what you are saying, and I don't want to put words into your mouth, but it seems like to me you are saying that you would do your best to consider whatever you were supposed to, but that you really don't think that you could impose the death penalty.
>
> MRS. GURR: No, sir, I'm afraid I couldn't.
>
> THE COURT: Is that right?
>
> MRS. GURR: Yes, sir.
>
> THE COURT: And that would be regardless of the circumstances, you're saying?
>
> MRS. GURR: I'm afraid I just could not do that.
>
> (728 F.2d at 1337)

The panel opinion in Collins deemed the statement of the juror the kind "we give the trial judge discretion in weighing". 728 F.2d at 1338. Petitioner does not perceive the response in Granviel to be more ambiguous requiring a different result. And not only the states remain confused. In McCorquodale v. Balkcom, 721 F.2d 1493 (11th Cir. 1983), cert. denied, _ U.S. __, __ L.Ed.2d __, 35 Cr.L. 4025, two judges dissented to an en banc determination that Witherspoon was not violated, complaining that the alleged failure to follow four earlier circuit rulings was "inexplicable" 721 F.2d at 1510.

If consistency is not achieved, one wonders what value is served by superimposing layer after layer of federal court review over the state court rulings. Whatever benefits may accrue, they are outweighed by the anguish engendered by

the federal courts' relegation of state judges to functioning as their magistrates and the confusion in the citizenry who may perceive that the seemingly arbitrary results are explained on the basis of which judge is assigned to a particular panel in a case. That belief is incorrect, if not dangerous, and should be discouraged if respect for the criminal justice system is to be maintained.

Providing deference to the state court findings in Witherspoon matters in accordance with 28 U.S.C. §2254(d) responds to three judicial policies. In the words of concurring Judge Higginbotham in O'Bryan v. Estelle, 714 F.2d 365 (5th Cir. 1983), these include:

> ". . . first, the recognition of a trial court as an integral level of an operating justice system; second, as an expression of comity and federalism, the deference owed a state court by a federal court engaged in

> collateral review; and third, recognition of the superior opportunity of an observer of witnesses to comprehend their testimony."

(714 F.2d at 392)

As to the first policy interest, this Court has previously addressed the desirability of rules which render the trial the main event rather than an exhibition contest for several collateral challenges which may last indefinitely. Cf. Wainwright v. Sykes, 433 U.S. 72, 90 (1977). The second policy, encouragement of the values of comity in a federal system recognized by the Congress in enacting 2254 (d) and enforced by Sumner and subsequent cases has been discussed earlier and need not be repeated. Finally, this Court can now take the opportunity expressly to recognize the vital, unique role occupied by the trial judge in observing the jurors. For the most part, the lower federal

courts have paid lip service to this element[2] but in practice the courts have relied solely on review of the printed record.

This Court has previously noted, in non-Witherspoon contexts, advantages trial judges have over their appellate brethren. In United States v. Oregon State Medical Society, 343 U.S. 326 (1952) the Court declared:

> As was aptly stated by the New York Court of Appeals, although in a case of a rather different substantive nature; "Face to face with living witnesses the original trier of the facts holds a position of advantages from which appellate judges are excluded. In doubtful cases the exercise of his power of observation ofte proves the most accurate method of ascertaining

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[2] See, e.g. Darden v. Wainwright, 725 F.2d 1526, at 1530 (11th Cir. 1984); Mccorquodale v. Balkcom, 721 F.2d 1493, at 1498 (11th Cir. 1984); Alderman v. Austin, 695 F.2d 124, at 128 - 134 (Fay. J., dissenting) (11th Cir. 1983).

> the truth . . . How can we say the judge is wrong? We never saw the witnesses . . . To the sophistication and sagacity of the trial judge the law confides the duty of appraisal." Boyd v. Boyd, 252 NY 422, 429, 169 NE 632, 634.

(343 U.S. at 339)[3]

The trial judge's tools unavailable to the reviewing court include the veniremember's demeanor, tone of voice, facial expression, emphasis, and other physical gestures. The trial judge alone can gauge the truthfulness of the responses and the clarity of the answers. In McCorquodale, supra, the court acknowledged that:

> "Even a simple 'yes', although on a cold record appearing crystal clear, can be delivered in a manner that conveys doubt."

(721 F.2d at 1498)

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3 The quote has been reiterated in Marshall v. Lonberger, supra, 74 L.Ed.2d at 658 - 659 and in Maggio v. Fulford, supra, 76 L.Ed.2d at 800.

If that is true it is difficult to understand how there can be any confidence in the conclusion reached by a reviewing court which has before it only the printed transcript. Ignoring the presence role of the trial judge on claims of this kind is irrational and such a policy is not required by the Constitution.

Other "silent" factors are relevant to the proper determination of asserted Witherspoon violations other than the venireman's responses. In the instant case, for example, trial defense counsel neither objected to the excusal of Mrs. Colby nor sought to rehabilitate her by seeking to ask additional clarifying questions. (JA 141) although he did object subsequently to the excusal of juror Kazmierczak (JA 147). Wainwright v. Sykes, supra, teaches that the failure to comply with a state's valid contemporaneous objection rule may

result in preclusion of consideration of the federal claim in the habeas court. And County Court of Ulster County v. Allen, 442 U.S. 140 (1979) teaches that if the state courts do not enforce the procedural default policy but reach the merits in a given case, the federal courts too must address the merits of the constitutional claim. Apart from procedural default considerations, the silence of trial defense counsel when a prospective juror is excused carries probative value of its own. Since he too hears the tone of response and observes the jurors' expressions, his failure either to interpose objection or propose additional questions corroborates the trial judge's ruling that the subsequently asserted ambiguity in the printed transcript did not manifest itself in the live drama of the courtroom. Cf. O'Bryan v. Estelle, 714 F.2d 365, at 376 -

378. (requiring defense counsel to demonstrate via additional questioning that a prospective juror could perform his duties as a juror after initial answers suggested he could not.)

Distinguishing purely factual questions from mixed questions of law and fact and apportioning the deference owed to state court findings on such matters has been the subject of much discussion by members of the Court in recent years. The majority and dissenting justices have disagreed on whether factual findings requiring deference by the lower federal courts are required in a photographic identification case. Sumner v. Mata, 449 U.S. 539 (1981) (Sumner I); Sumner v. Mata, 455 U.S. 591 (1982) (Sumner II); the voluntariness of a guilty plea, Marshall v. Lonberger, __ U.S. __, 74 L.Ed.2d 646 (1983); the competence of the defendant to stand

trial. Maggio v. Fulford, __ U.S. __, 76 L.Ed.2d 794 (1983); the harmless error nature of a judge and juror's ex parte communication. Rushen v. Spain, __ U.S. __, 78 L.Ed.2d 267 (1983).[4] Since reasonable men may disagree in categorizing a particular question as pure fact or mixed,[5] it is important to recognize in either the very limited role which a federal reviewing court may play. When called upon to decide whether a state court

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[4] At least one federal court apparently concluded that these decisions may require the application of 2254(d) presumption of correctness to any mixed question of law and fact. Patterson v. Cuyler, 729 F.2d 925 (3rd Cir. 1983). Such a suggestion must be regarded as premature. See Strickland v. Washington, __ U.S. __.

[5] Petitioner contends that a juror's response expressing the ability or willingness to perform the duties of a juror irrespective of the capital views held is factual determination. But, as explained in the text, characterizing the determination as mixed does not change the result.

has erroneously decided a federal constitutional claim, the federal court should make two inquiries. First, the court examines the record to determine whether the state court applied an erroneous federal constitutional legal standard. If it finds that the wrong legal standard has been applied, habeas relief may and will be afforded unless review of the facts demonstrates that application of the correct legal standard would sustain the state court conclusion. Secondly, if the record demonstrates that the state court understood and applied the correct legal standard the federal court may not reweigh the underlying facts supporting the conclusion; rather, the only inquiry it may make is whether there is fair support in the record for the factual finding. If there is, the federal court's role is at an end. Accord, Marshall, Maggio.

Goode, Rushen. In a rare case, the reviewing court may be unable to determine what standard was applied. A review of the facts is essential to determine what standard was applied. This instance is exemplified by LaVallee v., Delle Rose, 410 U.S. 690 (1973) Relying on Townsend v. Sain, 373 U.S. 293 at 314 - 315, the Court in LaVallee observed that the federal court may assume the correct legal standard was applied, and finding no suggestion of the utilization of an erroneous standard, the Supreme Court ruled that federal relief should be denied unless the facts could not support the result reached by the state court.

In the instant case, the record reflects that the state trial judge correctly understood and applied the proper standard. In each instance that the judge participated in the voir dire examination

he clearly inquired of the veniremen whether their capital views prevented them from following the law. (JA 150, 147, 156, 161 - 162; SR 648). Since Judge Ryder employed the correct standard, the federal court may only determine whether there is fair support in the record supporting the conclusion. Goode, supra. Cf. Jackson v. Virginia, 443 U.S. 307 (1979) (on sufficiency of evidence claim a federal court may grant habeas relief if no rational trier of fact would have found guilt proved beyond a reasonable doubt.) There is fair support in the instant record and the finding of Colby's expression of unwillingness to impartially decide Witt's guilt or innocence was concurred in by a unanimous Florida Supreme Court and the Federal district judge.

In summary, acceptance of the presumption of correctness principle of 28

U.S.C. §2254(d) to state court factual findings in Witherspoon claims enforces the congressional mandate to promote the interests of comity and federalism, is consistent with the developing body of case law which accords deference to state court fact finding, advances the desirable policy of providing finality to decisions and recognizes the reality that reviewing courts are in a disadvantaged position to that occupied by the original fact finder, the trial judge.

At the same time, an accused is not without remedy for an unjust ruling on such a claim. If the trial court has applied an erroneous legal standard or the facts cannot support the conclusion reached or the defendant was not provided an opportunity to examine the juror for a correct determination to be made, the federal courts are available to provide

habeas relief pursuant to the exceptions in subsections (2), (3), (6), (7) of 28 U.S.C. §2254(d).

II

ARGUMENT

The lower court ruling should be reversed for the failure to consider and apply the clearly erroneous rule, Rule 52(a), Federal Rules of Civil Procedure. That rule states in pertinent part:

> "Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses."

In Pullman-Standard v. Swint, 456 U.S. 273 (1982), this Court overturned the federal appellate court decision for rejecting the District Court determination on whether discriminatory intent had been shown in a seniority system:

> "Rule 52(a) broadly requires that findings of fact not be set aside unless clearly erroneous. It does not make exceptions or purport to exclude certain categories of factual findings

> from the obligation of a court of appeals to accept a district court's findings unless clearly erroneous. It does not divide facts into categories; in particular, it does not divide findings of facts into those that deal with "ultimate" and those that deal with "subsidiary facts."
>
> "The rule does not apply to conclusions of law. The Court of Appeals, therefore, was quite right in saying that if a district court's findings rest on an erroneous view of the law, they may be set aside on that basis. But here the District Court was not faulted for misunderstanding or applying an erroneous definition of intentional discrimination. It was reversed for arriving at what the Court of Appeals thought was an erroneous finding as to whether the differential impact of the seniority system reflected an intent to discriminate on account of race. That question, as we see it, is a pure question of fact, subject to Rule 52(a)'s clearly erroneous standard. It is not a question of law and not a mixed question of law and fact." (456 U.S. at 287,288)

The Court reasoned that it is commonplace for the trier of fact to treat

issues of intent as factual matters, citing Dayton Board of Education v. Brinkman, 442 U.S. 526 (1979); Commissioner v. Duberstein, 363 U.S. 278 (1960); United States v. Yellow Cab Co., 338 U.S. 228 (1949).

The lower court did not address the reasons for rejecting District Judge Carr's findings. In his order, Judge Carr stated:

> "Colby's statements read in their entirety clearly indicate that her personal beliefs against the death penalty would have prevented her from making an impartial decision as to the petitioner's guilt or innocence, which is sufficient to justify her exclusion under Witherspoon and Adams. Given that there exists no ironclad rule that responses to questions on voir dire incorporating the phrases "I think" or "I am afraid" necessarily involve Witherspoon defeats and reading the responses of Colby in context, the court concludes that her exclusion did not violate Petitioner's rights under the Sixth and Fourteenth Amendments. The state

> court's presumptively correct factual determination should accordingly stand. Sumner, supra."
> (R 68, Page 15)

The record does not suggest that Judge Carr misunderstood the law or applied an erroneous definition of the Witherspoon requirement. Thus, no legal question nor a mixed question of law and fact is present. Just as the determination in Swint of discriminatory intent was a question of fact so too the determination that Colby expressed her intent or mental state regarding her unwillingness to decide Witt's guilt or innocence as a result of her capital views was factual. See also Rogers v. Lodge, 458 U.S. 613 (1982) (applying Rule 52 to a trial court finding that a county at large election system was being maintained for discriminatory purposes); Inwood Laboratories v. Ives Laboratories, 456 U.S. 844 (1982)

(federal appellate court erred in rejecting District Court findings simply because the appellate court would have given more weight to certain findings).

Rule 52(a) has been held applicable to findings based on documentary evidence as well as those in which live testimony has been presented. United States v. United States Gypsum Co., 333 U.S. 364 (1948); Bose Corporation v. Consumers Union of United States, Inc, ___ U.S. ___, ___L.Ed.2d ___, 52 L.Wk. 4513 (1984).

The lower court's mere substitution of its view of the facts for that of the District Judge compels reversal.

III

ARGUMENT

The result reached by the lower court is not compelled by, indeed petitioner suggests it is refuted by, recent prior decisions of this Court. The suggestion below that failure to confore strictly to the verbatim language of footnote 21 of Witherspoon may prove a fatal defect is erroneous.[6/] In Lockett v. Ohio, 438

6/Frequently resort has been had to the two-pronged guideline in footnote 21 that it be unmistakable clear:

> ". . .(1) that they would automatically vote against the imposition of capital punishment without regard to any evidence that might be developed at the trial of the case before them or
>
> (2) that their attitude toward the death penalty would prevent them from making an impartial decision as to the defendant's guilt. . ."

As will be explained, this is a useful guideline but employment of its exact terminology is not in all cases required.

U.S. 586, 595-596 (1978), this Court found that veniremen could not be trusted to abide by existing law and to follow conscientiously the instructions of the trial judge after this dialogue:

> On voir dire, the prosecutor told the venire that there was a possibility that the death penalty might be imposed, but that the judge would make the final decision as to punishment. He then asked whether any ofthe prospective jurors were so opposed to capital punishment that "they could not sit, listen to the evidence, listen to the law, [and] make their determination solely upon the evidence and the law without considering the fact that capital punishment" might be imposed affirmatively. The trial judge then addressed the following questions to those four veniremen:
>
> "[D]o you feel that you could take an oath to well and truely [sic] try this case . . . and follow the law, or is your conviction so strong that you cannot take an oath, knowing that a possibility exists in regard to capital punishment?"

In this Court's most recent exposition of Witherspoon, Adams v. Texas, 448 U.S. 38 (1980), the Court reiterated:

> ". . .the State's legitimate interest in obtaining jurors who could follow their instructions and obey their oaths. For example, a juror would no doubt violate his oath if he were not impartial in the question of guilt." (448 U.S. at 44)

Justice White then provided this summary:

> "This line of cases establishes the general proposition that a juror may not be challenged for cause based on his views about capital punishment unless those views would prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath. The state may insist, however, that jurors will consider and decide the facts impartially and conscientiously apply the law as charged by the court."
>
> (emphasis supplied)
> (448 U.S. at 45)

Obviously, formalistic adherence to footnote 21 terminology is not essential.

Lockett did not employ footnote 21 terminology and Adams modified it by permitting excusal where the juror's views would substantially impair the performance of his duties as a juror. Fidelity to the precepts of Witherspoon requires, therefore, not use of any specific wording but only receipt of an assurance by the prospective juror of his willingness to follow the law as instructed by the trial court; excusal for any basis broader than unwillingness to follow the law, as by having mere feelings about the death penalty, is impermissible.

That strict adherence to the formula of footnote 21 is not essential is obvious. For example, the first prong of footnote 21 emphasized the word "automatically." No one would maintain that omission of the word would be a fatal defect for the excusal of a juror who says

that under no circumstances will he consider the death penalty. The second prong of footnote 21 deals with the juror's capital views in respect to the guilt-determining phase. Certainly a juror should be excused if he asserts that his capital views would insist on the state's proving guilt by a greater standard than the usual beyond a reasonable doubt - e.g. that he would insist on a standard of mathematical certainty - even though he urges his views would not prevent the determination of guilt or innocence.

The lower court alluded to Adams v. Texas but misconstrued its import. There, the court found unacceptable a state law requiring an oath that a juror's capital views not affect his deliberations on any issue of fact. A consequence of such a state requirement was that anyone who took

the responsibilities of jury duty seriously, those who "would invest their deliberations with greater seriousness and gravity" (448 U.S. at 49) would be subject to disqualification. Moreover, apparently there was no means to rehabilitate such a juror. If he admitted that such views would affect his deliberations, even a subsequent declaration of ability to consider the evidence presented and follow the law would not suffice to rehabilitate the juror. Refusal to swear not to be affected called for removal. Of course, many things can affect a juror: the gruesome nature of photos; a defendant's failure to adduce evidence in his own behalf; the inconvenience of participating in a lengthy trial. Neither these nor the prospect of carefully deciding another man's fate merit removal from jury duty.

In the instant case, juror Colby was not removed simply because her capital views would affect her emotionally. Her views had reached the plateau where they would impair her ability impartially to decide guilt or innocence:

> "MR. PLOWMAN: Would it interfere with judging the guilt or innocence of the Defendant in this case?
>
> COLBY: I think so.
>
> MR. PLOWMAN: You think so?
>
> COLBY: I think it would.
>
> (JA 142)

The lower court reasoned that "interfere with" is similar to the word affect. In the broadest sense, it can be said that almost any word can have inexact meanings. There is even litigation as to whether prevent means prevent. McCorquodale v. Balkcom, 721 F.2d 1493, at 1497, f.n. 4, (11 Cir. 1983). But "affect" is

ordinarily understood to mean to touch one emotionally. "Interfere with" is considerably stronger in denotation and connotation. "Interfere with" means to hinder or prevent. "Prevent" means to interpose an obstacle to. In the trial court no one suggested that "interfere with" had a meaning less than prevent. In fact, trial defense counsel in his voir dire examination of Mr. Gehm used the identical word:

> "MR. BEHUNIAK: That's right you said that previously. But you would not let it interfere with your determination?"
>
> (emphasis supplied) (JA-151)

Since an ordinary citizen understands the terms to be synonymous and since no confusion or misunderstanding was exhibited either by juror Colby, trial defense counsel or trial judge, and since the same understanding was exhibited by

seven state Supreme Court Justices and the federal district judge, one can only wonder how the lower court concludes that the Constitution compels that different meanings be ascribed to the words.7/

7/There can be no equation with the plateau reached in Colby's questions and answers with those provided by the excused jurors in Maxwell v. Bishop, 390 U.S. 262 (1970) (conscientious scruples that might prevent a death verdict or would make one have any feelings about returning a death sentence) or Boulder v. Holman, 394 U.S. 478 (1969) (jurors had fixed opinions against or did not believe in capital punishment). It should be noted that in neither case did the court ultimately decide there was a Witherspoon violation; a reversal was ordered for the district court to make the appropriate determination and frame the appropriate decree. 398 U.S. at 266; 394 U.S. at 484.

IV

ARGUMENT

As stated above, Adams acknowledges the legitimate state interest in insuring impartiality in the determination of guilt or innocence. That interest has been recognized for at least a century. In Hayes v. Missouri, 120 U.S. 68, at 70 (1887), this Court declared:

> "It is to be remembered that such impartiality requires not only freedom from any bias against the accused, but also from any prejudice against his prosecution. Between him and the state the sides are to be evenly held."

Petitioner understands an impartial juror to be one who can and will decide the guilt or innocence of the accused based upon the evidence presented and the instructions in the law given by the trial judge. A juror willing to base his

decision upon extraneous factors such as emotions, personal pique, or the individual views on the undesirability of the capital punishment sanction is not impartial; rather he is partial to the defendant. Partiality to a defendant in the guilt phase of a trial where unanimity is required among jurors need not be endured by the state nor is it compelled by the Constitution. Hayes, supra; Adams, supra.8/ Impartiality in a juror also requires that he or she be able to assure the trial judge of the ability and willingness to follow the instructions of

8/See also the comment of Mr. Justice Rehnquist in his dissenting opinion in Adams: "No one would suggest, however, that jurors would not be excused for cause if they declined to swear that the possibility of capital punishment would not affect their determination of the defendant's guilt or innocence." 448 U.S. at 54-55.

the court and to apply that law to the evidence produced at trial.

Acceptance of this principle would help alleviate many of the dilemmas faced by trial judges without seriously frustrating the legitimate purpose of Witherspoon and its progeny. For example, sometimes jurors simply will refuse (or be unable) to answer the questions propounded: (I really don't know; I can't say if I can follow the law). Sometimes jurors will provide qualifying or disqualifying answers dependent upon which advocate makes the inquiry or the form of the questions utilized. While removal of such jurors might not correspond to the two-pronged formula of footnote 21, excusal is appropriate because such jurors cannot be trusted to abide by existing law and to follow conscientiously the instructions of the trial judge. Lockett,

supra. At the same time, no inordinate, unchallengable discretionary power is invested in the trial judge. So long as the opportunity is afforded the defendant to rehabilitate an assertedly-ambiguous juror by clarifying questions, there need be no fear of arbitrary action. It may be urged that petitioner's proposal unjustifiably shifts the burden from the state who wants to excuse the juror to the defense who opposes excusal. First, for the reasons supporting the rule in Wainwright v. Sykes, 433 U.S. 71 (1977), a defendant should not be entitled to sit back in the trial court and subsequently assert the Witherspoon claim only after the verdict. Second, it blinks reality to suggest that the defendant's interest in a Witherspoon challenge is subordinate to that of the state. While the state desires excusal of a juror with capital

opposition tendencies, the defense similarly desires retention of such a juror for understandable reasons. Thus, there is every incentive for a defendant to attempt to rehabilitate and show juror qualification whenever there may be room for debate. Third, presently the lower courts alrady recognize such an affirmative duty upon the defense after a prima facie case of disqualification is made. O'Bryan v. Estelle, 714 F.2d 365, at 378 (11 Cir. 1981).

In the interest of providing clarity to the lower courts, petitioner submits that the Court announce the rule that where a juror fails to assure the trial judge that he can follow the law, i.e. to determine guilt or innocence based on the evidence presented at trial and the instructions given, and to similarly follow the law in determining the appropriate

penalty, such a juror may be excused for cause. Once a prima facie determination of such an inability is made, the burden rests upon the defendant to rehabilitate that juror by clarifying questions showing that the juror may follow the law. Failing that, the trial judge's determination is final (absent a showing that there is no reasonable basis for his judgment).9/

Justice Cardozo's observation long ago in Snyder v. Commonwealth of Massachussetts, 291 U.S. 97 at 102 (1934)

9/The alternative is to elevate form over substance and appearance over essence. Requiring only mechanical employment of a pat question to obtain an equally pat answer may seem simple but has turned out not to be so. It is not desirable to coerce prospective jurors into yielding only yes or no answers when they find themselves unable to honestly articulate the strain caused by personal deeply-held views and the conflicting responsibility to serve as citizen on a jury.

that "justice, though due to the accused is due to the accuser also" has not lost its force. It retains its vitality even when the trial involves the possible imposition of the death penalty. Indeed, impartiality is most important then.

CONCLUSION

This Court should now hold that state court findings requiring a juror's ability or inability to follow the law are factual maters governed by 28 U.S.C. §2254(d). Similarly, a district judge's finding in this regard is governed by Rule 52(a), Federal Rules of Civil Procedure. Since the trial judge is in the best position to evaluate physical as well as verbal responses and reviewing courts are disadvantaged in reviewing only a printed page, great deference must be afforded the trial judge's conclusions. A trial judge may excuse any juror who fails to provide assurance to the court that he can follow the law. On this record, the lower court, in substituting its judgment for that of

the state court, requires reversal.

Respectfully submitted,

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CERTIFICATE OF SERV'CE

I, ROBERT J. LANDRY, counsel for Petitione, and a member of the Bar of the United States, hereby certify that on the 11th day of June, 1984, I served three copies of the Petitioner on the Merits filed pursuant to Supreme Court Rule 22.6 on William C. McLain, Esquire, Assistant Public Defender, Chief, Capital Appeals Section, Hall of Justice Building, 455 North Broadway, Bartow, Florida 33830-3798 by a duly addressed envelope with postage prepaid.

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AMICUS CURIAE

BRIEF

NO. 83-1427

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

LOUIE L. WAINWRIGHT,

Petitioner,

V.

JOHNNY PAUL WITT,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

MOTION FOR LEAVE TO FILE BRIEF AND BRIEF OF AMICI CURIAE, TEXAS DISTRICT & COUNTY ATTORNEYS ASSOCIATION, JOINED BY THE STATE OF ALABAMA, THE STATE OF ARIZONA, THE STATE OF ARKANSAS, THE STATE OF CALIFORNIA, THE STATE OF CONNECTICUT, THE STATE OF MISSISSIPPI, THE STATE OF MISSOURI, THE STATE OF OKLAHOMA, AND THE STATE OF UTAH,* IN SUPPORT OF PETITIONER WAINWRIGHT

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NO. 83-1427

IN THE
SUPREME COURT OF THE UNITED STATES

LOUIE L. WAINWRIGHT,

Petitioner,

V.

JOHNNY PAUL WITT,

Respondent.

MOTION FOR LEAVE TO FILE BRIEF OF AN AMICUS CURIAE

The Texas District and County Attorneys Association ("TDCAA") respectfully moves for leave to file the attached brief as amicus curiae. Several States, acting through their Attorneys General, have joined in the brief, but are not parties to this Motion because the Rules of this honorable Court authorize them to appear without the necessity of a Motion. In support of its Motion, TDCAA would show the court as follows:

1. *Interest of Amicus Curiae.* TDCAA is a non-profit association of more than 1,000 elected district attorneys, county attorneys, and their assistants practicing in Texas. Its purpose, as stated in the Bylaws of the Association, is to "promote the improvement of prosecution in Texas." TDCAA conducts regular continuing education programs, and it publishes books on subjects of interest to its members. It also takes public positions on matters significant to the enforcement of law, and it cooperates in various ways with State agencies (including statutory duty of appointment of some members of one State agency).

2. *Specific Interest in the Case at Bar.* TDCAA's members are continuously engaged in the litigation of criminal cases, including capital cases. They would be affected directly in their statutory obligations if the reasoning of the court below were to

be adopted here. Since TDCAA's members appear in the trial courts of Texas to represent the State in these important cases, TDCAA may be able to assist the Court in developing the issues fully.

3. *Purpose of Amicus Curiae Brief.* TDCAA's purpose, in this brief, is to deal with the practical repercussions of the decision below. Amicus curiae has communicated with counsel for Petitioner in an effort to avoid undue duplication. It is believed that this brief argues the practical implications in a manner that will not be done in Petitioner's brief.

4. *Public Importance of the Issues Addressed Here.* Claims of *Witherspoon* error are a disproportionately frequent issue in review of capital cases. TDCAA submits that the jury disqualifications at issue here were sound, proper and necessary to capital sentencing. If the examinations and rulings of the trial judge in this case were deemed improper, the consistent results that are desirable in capital sentencing will be more difficult to attain.

5. *Requests for Consent.* The consent of the Petitioner to the filing of this brief has been requested and granted. The consent of Respondent Witt has been requested and refused. This Motion is therefore filed in accordance with the Rules of this Court.

6. *Joinder by States.* The States listed as additional amici hereto join in the brief by their authority under the Rules of this honorable Court to appear through their respective Attorneys General without the necessity of a Motion.

FOR THESE REASONS, TDCAA prays that it be granted leave to file the attached brief as amicus curiae.

Respectfully submitted,

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NO. 83-1427

IN THE
SUPREME COURT OF THE UNITED STATES

LOUIE L. WAINWRIGHT,
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JOHNNY PAUL WITT,
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BRIEF OF AMICI CURIAE

INTEREST OF AMICI CURIAE

The interest of amici curiae is set forth in paragraphs 1 and 2 of the Motion preceding this brief.

STATEMENT OF THE CASE

Amici curiae adopt the Statement of the Case made by petitioner-appellant, Director Wainwright.

SUMMARY OF ARGUMENT

It is expected that Petitioner Wainwright's brief will thoroughly discuss case law and its application to the evidence. This brief therefore does not seek to repeat Petitioner Wainwright's arguments, although amici curiae are generally in agreement with them and wish to express support for them. Instead, this brief deals with policy questions in the interpretation of *Witherspoon v. Illinois*, 391 U.S. 510 (1968). Specifically, amici curiae wish to show the Court that fact findings by trial judges, such as those at issue in this case, are absolutely necessary if there is to be rational capital sentencing. Without authority in trial judges to make such fact findings, the consistency in sentencing demanded

by this Court's decisions would be far more difficult to achieve.

I.

Jurors in capital cases often give equivocal or tentative answers if they are in fact *Witherspoon*-disqualified. Many venire members are hesitant, when they are in a courtroom under oath, to testify flatly that they intend to violate the law. This admission is exactly what *Witherspoon* requires of them. Furthermore, what *Witherspoon* calls for is a prediction of the venire member's *future* behavior in deciding a case that is as yet hypothetical. Some truthful venire members cannot be more precise than to say what they "think" they will probably do when faced with the difficult responsibility of deciding a capital case. The inquiry is still further complicated because few venire members come into court with their personal philosophies so precisely formulated they are able or willing to adopt the exact words of the *Witherspoon* opinion. For these reasons, the substance of venire members' responses, rather than the technical form of words they happen to use, must be the focus of the trial judge's inquiry.

II.

Judges who have seen and heard the evidence must have authority to make findings of fact regarding venire member's attitudes. They are given such authority with respect to other juror qualifications, including those that affect substantial rights of the defendant. If they were prevented from making such findings in this context, the result would be that jurors who would in fact automatically vote in derogation of the law or evidence, or who could not be impartial, would nevertheless be required to be seated. Capital trials would then be less effective in achieving the consistent results demanded by this Court's decisions, such as *Furman v. Georgia*, 408 U.S. 238 (1972), because results would sometimes depend upon the chance distribution of such automatically voting jurors rather than upon the law and evidence.

ARGUMENT AND AUTHORITIES

I. IT IS NATURAL FOR WITHERSPOON-DISQUALIFIED VENIRE MEMBERS TO EXPRESS THEIR STATES OF MIND HESITANTLY AND IN THEIR OWN WORDS.

A. Witherspoon calls upon venire members to admit, under oath and in a courtroom, that they would violate state law if seated on a capital jury. Forcing jurors to adopt technical language, rather than explaining their personal positions in their own words, usually meets with understandable resistance.

It is rare that a venireperson comes to the courtroom with an innately formulated position articulable in precise *Witherspoon* terms, even if he is in fact *Witherspoon*-disqualified. Frequently, the initial response of such a potential juror is that he is "against" the death penalty or is "opposed" to it. More precise initial formulation cannot be expected of an ordinary citizen summoned for jury service. However, such responses may or may not ultimately lead to disqualification. Further questioning is necessary to obtain information in more precise *Witherspoon* terms.

The result is quite often hesitation by the venire member. What he is asked, literally, is whether he would probably violate the law if seated on the jury. Such an admission is not easily articulated, even if it is true and even if the venireperson is sincere and conscientious. The following law review description[1] was written about the time that the Florida courts considered Respondent Witt's case:

> One must consider the state of mind of a venireperson being interrogated by the court and counsel before the trial of a capital case.

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1 Crump, Capital Murder: The Issues in Texas, 14 HOUS. L. REV. 531, 541-42 (1977). The pattern usually repeats itself in most capital cases, given that questioning of seventy, eighty or even a hundred or more veniremen is not unusual in a capital case.

Although the judge and lawyers may ardently desire a firm, clear statement from the potential juror that either does or does not conform to the *Witherspoon* test, the juror is frequently unable or unwilling to express a position in precise *Witherspoon* terms. The jurors are questioned individually, under oath, while seated on the witness stand. Interrogation by adversary lawyers ready to analyze every word in the solemn atmosphere of a courtroom makes the potential juror answer cautiously. Forcing the juror to adopt the words of the *Witherspoon* test rather than allowing the juror to explain an individual position is distasteful and usually meets with understandable resistance. Furthermore, the potential juror often has not formulated an attitude on such a difficult issue as capital punishment with the precision that the *Witherspoon* test demands. The result is the problem, well known to lawyers in capital cases, of the equivocating venireperson. The potential juror may, in effect, refuse to answer the *Witherspoon* question at all, may use his or her own words in expressing a position on the death penalty, or may even change positions several times during the examination within seconds.

When a juror's state of mind is such that he would be forced by his conscience to act inconsistently with the law if seated on a jury, he is often so pressed on the horns of the dilemma that he simply stops answering questions or is reduced to tears. The decisions of the courts of appeals reflect such instances.[2]

2 E.g., Granviel v. State, 655 F.2d 673, 687 (5th Cir. 1981): "The Court: 'Mrs. Wallace, I am sure you do feel very deeply about this. It's brought tears to your eyes, is that right?' Veniremoman Wallace: 'Yes.'" But in spite of her "deeply felt" conscientious refusal to consider death as a sentence, the veniremoman had initially equivocated. Id. at 685-87. Such responses are natural when the juror is placed in the position of admitting that he or she would be forced to violate the law.

For these reasons, the *Witherspoon* test is "not to be applied with the hypertechnical and arcane approach of a nineteenth century pleading book, but with realism and rationality." *Texeno v. State*, 484 S.W.2d 374 (Tex. Crim. App. 1972). "*Witherspoon* governs the substance of the inquiry, not its form, and only requires that the voir dire method used for questioning and receiving responses allows a court to determine [the grounds for exclusion] in the particular case at hand. . . ." *McCorquodale v. Balkcom*, 721 F.2d 1493, 1496 (11th Cir. 1983). As the Fifth Circuit said in *Williams v. Maggio*, 679 F.2d 381, 386 (5th Cir. 1982) (en banc), "According to Petitioner's analysis, exclusion of a venireman is impermissible unless he states in response to all questions that he absolutely refuses to consider the death penalty. . . . We reject such a rigid, unthinking application of *Witherspoon*. Form will not be placed over substance." *See also Texas v. Mead*, 104 S.Ct. 1318, 1321 (1984) (dissenting opinion of Mr. Justice Rehnquist).

B. Often, all that a truthful veniremember can give is a prediction of the behavior that he/she "believes" or "thinks" he/she will display when confronted in the future with the responsibility to decide a capital case.

What the *Witherspoon* test really requires is a *prediction by each potential juror of his or her behavior in the future*. The potential juror is asked whether he believes he will be able to avoid an automatic vote in a case that is yet to be heard, or whether he believes he will be able to decide guilt or innocence impartially based upon the evidence he is to hear in the future. The potential juror is almost certain not to have seen all of the evidence in any previous capital case, and he is likely to be able only to estimate the sort of pressure the decision will place upon

him. Faced with such an inquiry, some jurors find it impossible to state absolutely what their behavior will be when, in the future, they are confronted with photographs, testimony and other evidence surrounding a gruesome crime, or when they are given the responsibility to decide whether the human being before them is to be sentenced to death. Thus the truthful juror is likely to respond with the words that are appropriate to predictions, such as that he "thinks" or "believes" that his behavior will be an automatic vote or a failure of impartiality.

The effort to pin such a juror down to an absolute prediction of his future behavior often produces examinations such as those at issue in *O'Bryan v. Estelle*, 714 F.2d 365 (5th Cir. 1983). Questioning of some jurors in that case occupied up to forty pages of transcript. The three jurors who were the subject of the Fifth Circuit's inquiries were each asked literally dozens of times in different ways about their views in an effort to answer the *Witherspoon* inquiry. All of them repeatedly used equivocal phrases such as "I think." One, at one point, described himself as "a borderline thinker on the subject." When asked whether he could decide the facts impartially, this *O'Bryan* venire member replied:

> I believe I would, as you say, as facts, I don't know. Like I say, I would have reservations really regardless of what we consider facts in myself. I mean, as far as personal belief. I wouldn't elaborate to a greater extent, but I would think other than that fact–[response ended].

O'Bryan v. Estelle, *supra*, Record at 877. Later, when asked a direct question in *Witherspoon* terms, this same *O'Bryan* venireperson responded: "Well, I just–apparently, I just couldn't vote for it with facts even if there were facts of witnesses, I would possibly–[response ended]." *Id.*, Record at 879. These garbled responses are typical of those that the *Witherspoon* inquiry produces even in thoughtful and articulate lay persons called as jurors.

To these concerns must be added the possibility of frustration of the guilt-innocence determination by jurors who conscientiously refuse to consider capital sentencing. Several courts have raised the possibility that persons so absolutely opposed to capital punishment might consider it their duty to frame their responses to the *Witherspoon* inquiry so that they are able to serve on the jury, and, while so serving, might consider it their further duty to vote so as to prevent the morally repugnant outcome of capital punishment–i.e., to vote against conviction irrespective of the evidence. One judge in *O'Bryan* referred to such a person pejoratively as the "lying" juror. 714 F.2d at 406. While deliberate falsification might well occur in some instances, amici submit that the more likely possibility is that a venireperson would have simply overestimated the capacity of his or her mind to apply cold logic in disregard of the consequences.[3] Thus in *Spinkellink v. Wainwright*, 578 F.2d 582, 595-96 (1978), the Fifth Circuit said:

> . . . Florida apparently has concluded that, if for whatever noble reason–religious conviction, philosophical posture, intellectual stance, or some other reason–a venireman clings so steadfastly to the belief that capital punishment is wrong that he would never under any circumstances agree to recommend the sentence of death, it is entirely possible–perhaps even probable–that such a person could not fairly judge a defendant's guilt or innocence when a capital felony is charged. . . . [This behavior] would frustrate Florida's interest in the just and evenhanded application of its laws, including its death penalty statute. . . .

3 Testimony in habeas corpus proceedings upon capital convictions discloses cases in which precisely this result has occurred. See Mabry v. Grigsby, No. 83-2113-EA (5th Cir., pending), Record at 1644-45 (witness Pierre).

> . . . [I]mpartiality requires not only freedom from jury bias against the accused and for the prosecution, but freedom from jury bias for the accused and against the prosecution. . . . Florida has reasoned that a person may so cherish his conscientious scruples against the death penalty that he would favor the acquittal of a defendant charged with a capital felony. . . . Florida has determined . . . that although a person states that he could fairly judge guilt or innocence, if he also states that he has irrevocably committed before the trial has begun to vote against the penalty of death, regardless of the facts and circumstances that might emerge at trial, he must be excluded completely. . . . [T]he state's interest in the just and even-handed application of its laws . . . [is] too fundamental to risk. The Constitution does not prevent this judgment.

There are some states of mind that make impartiality so difficult that the law is justified in treating it as unattainable. For example, if a defendant's brother were a member of the venire, he would be excluded even if he stated that he could decide guilt with total impartiality. Indeed, he would be properly excludable even if he could demonstrate persuasively that he had a coldly logical mind. As Spinkellink demonstrates, it is not unreasonable to authorize a judge to conclude, on the basis of his interpretation of a juror's responses to the *Witherspoon* inquiry, that a particular veniremember will, in fact, be unable to be impartial when confronted with the difficult decision to be made in an actual capital case, even though all the juror can truthfully say is what he "thinks" his behavior will be.

II. IF JUDGES WHO HAVE SEEN AND HEARD THE TESTIMONY WERE PREVENTED FROM MAKING REASONABLE FACT FINDINGS CONCERNING JURY QUALIFICATIONS, RATIONAL AND CONSISTENT CAPITAL SENTENCING WOULD BE MORE DIFFICULT TO ACHIEVE.

A. If jurors were accepted who would automatically vote against capital punishment in derogation of the evidence, the process could not produce consistent results. Thus if disqualifications such as those in this case were not considered proper, sentences would display the inconsistent results condemned by the Supreme Court in Furman v. Georgia.

If judges were prevented from making fact findings, the result would be that some jurors factually disqualified under *Witherspoon* would necessarily be seated. Inconsistent results would follow. The distribution of such jurors from case to case would not be uniform. In cases with heinous murders highly deserving of capital punishment, such as this case, the impaneling of such jurors would prevent that result. Thus outcomes could depend not upon the evidence in each case, but upon whether a given jury array happened to include a potential juror of this state of mind. Capital sentencing would be less accurate and consistent than it would otherwise be. If the insistence on technical reading of *Witherspoon* were taken to extremes, the results could eventually display the "wanton and freakish" results condemned by this Court in *Furman v. Georgia*, 408 U.S. 238 (1972) and *Gregg v. Georgia*, 428 U.S. 153 (1976).[4]

Similarly, inconsistent results would occur if trial courts were disallowed from construing *Witherspoon* with "realism and

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4 In addition, such an approach would be unfair to veniremenons. It is simply inappropriate for our society to forcibly require veniremenons such as Colby to adjudicate capital crimes in heinous cases that support capital punishment under the law, when their own, conscientiously-held state of mind contradicts that law. Our society does, occasionally, force citizens to undertake obligations to which they have deeply felt conscientious objections, but there are strong reasons against doing so. Particularly in the death penalty area, doing so is entirely inappropriate.

rationality." *Tezeno v. State*, *supra*. For example, one venireman in *O'Bryan*, *supra*, stated at one point that he could only consider capital punishment if the victim was "one of my family"; if *Witherspoon* were construed to mean that such a juror must be qualified, it would be reduced to absurdity, because the qualification would then itself be based only upon a disqualifying bias. In summary, the "rigid, unthinking" approach condemned in *Williams v. Maggio*, *supra*, would not only be a misapplication of *Witherspoon*, it would also be a virtual guarantee of haphazard results.

The *Witherspoon* criteria are carefully balanced. With impeccable logic, *Witherspoon* states that general objections to capital punishment cannot, alone, disqualify. Most members of the population have "reservations" about capital punishment, in the sense that they believe it should be strictly confined to the most horrible murders. Disqualification upon less than automatic rejection of capital punishment (or lack of impartiality on guilt) would therefore be impossible to administer without disqualification of most of the jury array.

On the other hand, however, *Witherspoon* recognizes that disqualification of those who would automatically exclude capital punishment is also necessary, if there is to be rational capital punishment. This side of *Witherspoon*, allowing disqualification, is as much the law as the other side, preventing improper challenges. *Witherspoon* disqualifications made upon appropriate fact findings by the trial court should not be viewed grudgingly, as though the challenges were somehow improperly exercised. Consistent sentencing requires that the administration of the *Witherspoon* rule not be so unrealistic or technical that it prevents the disqualification from being enforced as a practical matter.

B. Jury disqualification fact judgments are made by trial judges in a wide variety of contexts in which defendants' rights are at issue, and it is logically necessary, both in those contexts and in this, that they have such authority.

Whenever contested issues arise, trial judges are required to

find the facts regarding jury disqualifications. If those fact findings are reasonably supportable by the evidence they are consistently given deference both on direct appeal and on habeas corpus. Thus in cases involving pretrial publicity or bias or prejudice against the accused or the prosecution, findings of trial judges have been afforded deference even though the qualification or disqualification of the juror affected fundamental rights of the defendant. *See, e.g., Reynolds v. United States*, 98 U.S. 145, 156 (1878) ("[t]he finding of the trial judge on that issue [the force of the prospective juror's opinion or prejudice from publicity] ought not to be set aside by a reviewing court unless the error is manifest"). In *Rosales Lopez v. United States*, 451 U.S. 182, 187 (1981), the Court said:

> Despite its importance, the adquacy of *voir dire* is not easily subject to appellate review. The trial judge's function at this point in the trial is not unlike that of the jurors later on in the trial. Both must reach conclusions as to impartiality and credibility by relying on their own evaluations of demeanor evidence and of responses to questions. See *Ristaino v. Ross*, 424 U.S. 589, 595, 96 S.Ct. 1017, 1020, 47 L.Ed.2d 258 (1976), quoting *Rideau v. Louisiana*, 373 U.S. 723, 733, 83 S.Ct. 1417, 1422, 10 L.Ed.2d 663 (1963) (Clark, J., dissenting). In neither instance can an appellate court easily second-guess the conclusions of the decisionmaker who heard and observed the witnesses.
>
> Because the obligation to impanel an impartial jury lies in the first instance with the trial judge, and because he must rely largely on his immediate perceptions, federal judges have been accorded ample discretion in determining how best to conduct the *voir dire*.

Someone must decide the facts regarding the asserted disqualification, and the trial judge who has seen and heard the testimony is the only appropriate fact finder.

Witherspoon disqualification also requires such authority in the trial judge. For example, what is to be done if a potential juror at one point states unmistakably that he will exclude capital punishment but then contradicts that statement at another point in his examination (a common occurrence)? If the trial judge must accept such a juror, sentencing cannot be consistent, and the state's compelling interest in the evenhanded enforcement of its death penalty will be frustrated. And what of the venire member who adamantly refuses to answer in the technical words of *Witherspoon* because he regards his position as an individual one and will not tolerate having lawyers force him to adopt their words (also a common occurrence)? Again, the entire examination may make clear to the trial judge that the venire member is disqualified, and seating him on the jury would then mean the same haphazard results that were condemned in *Furman v. Georgia*, *supra*. Another possible, if rare, case is that of the venire member who indicates that his opposition to capital punishment will lead him to insist on untruthful answers so that he can serve on the jury for the express purpose of frustrating state law. In such a case, disqualification would be appropriate even though the literal answers of the juror to the *Witherspoon* inquiry showed that he was qualified, and indeed any other approach would produce absurd results.

But the most common case is that of the venire member who has never confronted the question in depth, is confused by the technical phrases in the *Witherspoon* standard, hesitates to admit that he intends to violate the law, and cannot predict his performance under pressure without using words appropriate to predictions. In the case of such a juror, the trial judge must have the ability to find facts governing disqualification from the juror's own words, for the same reason that he must be able to find the facts in other jury qualification cases.

C. *Overly technical interpretations of Witherspoon have made it one of the dominant issues in review of capital cases and have made dispositions depend upon nuances in jury selection questioning rather than upon the law and evidence.*

Today, *Witherspoon* questions are a disproportionately

important issue in capital cases upon federal habeas corpus. The dispositions of very serious crimes are thus made to depend upon an appellate court's parsing of the chance combination of words chosen by an understandably inarticulate potential juror during a few seconds of a lengthy and complex procedure. Such dispositions should depend more heavily upon the substance, rather than the form, of the answers provided by potential jurors.

CONCLUSION

The decision of the Court of Appeals should be reversed. This honorable Supreme Court should adopt an approach that preserves the *Witherspoon* standard but accords deference to the findings of the trial judge in the application of that standard, similar to the deference accorded findings on analogous issues.

Respectfully submitted,

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RESPONDENT'S

BRIEF

No. 83-1427

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

LOUIE L. WAINWRIGHT, Secretary,
Florida Department of Corrections,

Petitioner,

vs.

JOHNNY PAUL WITT,

Respondent.

On Writ Of Certiorari To The United States
Court Of Appeals For The Eleventh Circuit

BRIEF OF RESPONDENT ON THE MERITS

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QUESTIONS PRESENTED

1. Whether, in the absence of any explicit or implicit factual findings by the state trial court or any relevant finding by the state supreme court, the court of appeals was correct in conducting an independent review of the voir dire transcript to determine whether a juror was excluded in violation of *Witherspoon* v. *Illinois*, 391 U.S. 510 (1968)?

2. Whether the court of appeals was correct in conducting an independent review of the record and rejecting the district court's finding which was infected by two separate legal errors and, in addition, was clearly erroneous?

3. Whether the court of appeals correctly concluded that the exclusion of potential juror Colby was impermissible under *Adams* v. *Texas*, 448 U.S. 38 (1980)?

4. Whether, based on a claim never raised below, this Court should overturn sixteen years of precedent holding that death-scrupled jurors may be excused for cause only if they make unmistakably clear that they cannot be impartial?

5. Whether the secret, systematic, ex parte solicitation and consideration of psychiatric, psychological, and other sensitive materials by a state appellate court in connection with its review of capital convictions and sentences violates the Constitution?

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BRIEF FOR RESPONDENT ON THE MERITS

STATEMENT OF THE CASE

Johnny Paul Witt was convicted of the murder of Jonathan Kushner and sentenced to death. He appealed his conviction and death sentence, challenging the exclusion of certain jurors who voiced scruples about capital punishment. The Florida Supreme Court affirmed the conviction and sentence, holding that it was proper to exclude potential jurors who "stated that they could not judge the guilt or innocence of the accused without the possible imposition of the death penalty interfering with that determination." *Witt* v. *State*, 342 So.2d 497, 499 (Fla. 1977). The issue was presented to this Court, but certiorari was denied. *Witt* v. *Florida*, 434 U.S. 935 (1977).

Witt then sought state post-conviction relief, which was denied. The Florida Supreme Court affirmed, *Witt* v. *State*, 387 So.2d 922 (Fla. 1980), and this Court denied certiorari. *Witt* v. *Florida*, 449 U.S. 1067 (1980). It was subsequently discovered that, in connection with its appellate review of capital cases, the Florida Supreme Court had, ex parte, regularly solicited and reviewed prison-generated psychological reports and similar evaluations of death-sentenced inmates. On September 29, 1980, Witt joined 122 other capital defendants in filing an application for extraordinary relief and petition for writ of habeas corpus in the Florida Supreme Court challenging this practice. That court dismissed the application for failure to state a claim upon which relief could be granted. *Brown* v. *Wainwright*, 392 So.2d 1327 (1981). This Court denied certiorari. 454 U.S. 1000 (1981).

Witt then filed a petition for federal habeas corpus asserting, inter alia, the improper exclusion of jurors in violation of *Witherspoon* v. *Illinois*, 391 U.S. 510 (1968).

The district court denied the petition, but the court of appeals reversed. It held that the exclusion of juror number one, Evelyn R. Colby, was improper under *Witherspoon* and *Adams* v. *Texas*, 448 U.S. 38 (1980). *Witt* v. *Wainwright*, 714 F.2d 1069, 1080-85 (11th Cir. 1983); J.A. 41-56.

Juror Colby was the very first juror examined by the prosecutor on individual voir dire.[1] She answered affirmatively, along with the other jurors, the trial court's inquiry whether "each of you feel that if selected, can you pass fairly and impartially on this case after listening to the facts and applying the law that will be given to you by the Court at the conclusion of this case?" R. 234. She answered "yes" to the prosecutor's inquiry whether she would follow the court's instructions on premeditation. R. 258.

The prosecutor then explained that, at the penalty phase, the jury would hear "certain aggravating circumstances and certain mitigating circumstances." J.A. 139. He told the jury that "if seven of you . . . feel one way, life imprisonment or the death penalty," *id.*, the jury would announce its verdict, which the judge would "consider . . . as an advisory opinion." J.A. 140. He then turned to Colby.

> BY MR. PLOWMAN: Now, let me ask you a question, ma'am. Do you have any religious beliefs or personal beliefs against the death penalty?

[1] The trial court first asked the jury panel a series of questions concerning their citizenship, age, and potential bias. R. 226-27, 234. Starting with juror Colby, the prosecutor asked each of the first twelve jurors general questions regarding their occupations, marital status, residence and prior jury service. R. 227-33. He then addressed the panel collectively and explained reasonable doubt, premeditation, and felony murder. R. 254-64. He next asked the questions set out at J.A. 139-42 that led to Colby's exclusion.

> JUROR NUMBER ONE: I am afraid personally but not—
>
> MR. PLOWMAN: Speak up, please.
>
> JUROR NUMBER ONE: I am afraid of being a little personal, but definitely not religious.
>
> MR. PLOWMAN: Now, would that interfere with you sitting as a juror in this case?
>
> JUROR NUMBER ONE: I am afraid it would.
>
> MR. PLOWMAN: You are afraid it would?
>
> JUROR NUMBER ONE: Yes, sir.
>
> MR. PLOWMAN: Would it interfere with judging the guilt or innocence of the Defendant in this case?
>
> JUROR NUMBER ONE: I think so.
>
> MR. PLOWMAN: You think it would?
>
> JUROR NUMBER ONE: I think it would.
>
> MR. PLOWMAN: Your Honor, I would move for cause at this point.
>
> THE COURT: All right. Step down.
>
> MR. PLOWMAN: Step down, ma'am. (Evelyn R. Colby, Juror Number One, was excused.)

J.A. 141-42.

Colby's voir dire does anything but "clearly indicat[e] that her personal beliefs against the death penalty would have prevented her from making an impartial decision as to Witt's guilt or innocence." State's Brief at 7. Colby had already indicated during the collective voir dire that she would be impartial. Examination of her individual voir dire reveals only imprecise questions and inescapably ambiguous responses. She said that she was "afraid of being a little personal" about the death penalty, without indicating the strength of those feelings. She was asked whether that would "interfere" with her "sitting as a

juror," and she replied that she was "afraid it would." But this was without any antecedent explanation of the duties of sitting as a juror; thus, she did not know what kind of interference she was being asked to disclose. She was asked whether her feelings would "interfere with judging the guilt or innocence of the Defendant." She replied: "I think so." But there was no explanation of what was meant by "interfere,"[1] no inquiry whether such interference was serious or slight, and no inquiry whether she could subordinate her personal feelings to her duty as a juror. Thus, these questions and answers fail to establish an impairment of Colby's judgment that would taint her impartiality. They only establish that she thought her personal feelings about the death penalty would give her difficulty of some undefined sort.

The court of appeals held that juror Colby was improperly excluded because her responses did not make unequivocally clear either that she could not consider the death penalty or that she could not be impartial on guilt or innocence. It noted that the uncertainty of her responses was in part the result of the "State's failure to frame its questions in an appropriately unambiguous manner." J.A. 47. The court below did not rest its decision on the juror's use of the terms "I think" and "I am afraid," but rather considered these responses as "but a part of the total circumstances of the voir dire, although a justifiably important part." J.A. 55. It rejected any per se rule based on the juror's use of the term "I think," stating that: "We agree that no such rule exists in this Circuit." *Id.* And the court of appeals specifically rejected the necessity for any

[1] The verbs "interfere," "sit," and "judge" had no clear meaning in the context of this voir dire; it was never explained to juror Colby that her role as a juror was to set aside her personal dispositions, listen to all the evidence, apply the judge's instructions on the law, determine guilt or innocence according to the law, and consider the range of penalties prescribed by the law.

talismanic answers, noting that its decision "does not require that the venireperson utter a pat phrase, the incantation of which magically frees the power of excusal from its yoke of unconstitutionality." J.A. 55-56.

The court of appeals rejected respondent's *Brown* claim on authority of the en banc decision in *Ford* v. *Strickland*, 696 F.2d 804 (11th Cir. 1983). J.A. 30-32. In *Brown*, the Florida Supreme Court had accepted the factual allegations of the systematic solicitation, receipt, and consideration of ex parte, prison-generated, psychological reports and similar materials concerning death-sentenced appellants before it on direct appeal and ruled as a matter of law that they presented no constitutional violation. *Brown* v. *Wainwright*, 392 So.2d at 1331. It distinguished between the functions of sentence "imposition" and "review," *id.* at 1331, 1332 and 1333, and limited *Gardner* v. *Florida*, 430 U.S. 349 (1977), to sentence imposition. Since "non-record information we may have seen . . . plays no role in capital sentence 'review' . . .," *id.* at 1332-33, "[a]s we view the case, . . . appellate review can never be compromised, in the constitutional sense . . ., by the receipt of any quantity of non-record information." *Id.* at 1333 n.16. The Florida Supreme Court then concluded that: "Even if petitioners most serious charges were accepted as true, *as a matter of law* our view of the non-record information petitioners' have identified is totally *irrelevant* . . . to our appellate function in capital cases. . . ." *Id.* at 1331 (emphasis added). In *Ford*, a badly divided Eleventh Circuit sanctioned the ex parte receipt of evidence by the Florida court. The majority view was expressed in two opinions. A plurality opinion by Judge Roney for himself and four others assumed that the use of ex parte materials by an appellate court in reviewing capital sentences would violate *Gardner*. *Ford*, 696 F.2d at 810. But it read the *Brown* opinion as

asserting that the Florida court did not "use" the materials it had solicited. *Id.* at 810-11. Judge Tjoflat, the decisive sixth vote, concurred specially. He determined that the Florida court had read the materials but that it did not rely on them. *Id.* at 832-33. The five dissenting judges took the view either that the Florida court had not been clear whether it had relied on the materials or that the Florida court had admitted using them. *Id.* at 820-21, 845-53, and 872-76.

SUMMARY OF ARGUMENT

Whether a *Witherspoon* issue is a pure question of historical fact to be determined by according state court findings a presumption of correctness under 28 U.S.C. § 2254(d) is not an issue relevant to decision in this case. The state trial judge made no explicit or implicit factual findings concerning the exclusion of potential juror Colby. Until its brief on the merits in this Court, the state has never asserted in any court, state or federal, that the state trial judge made a pertinent factual finding. And even here, the state fails to identify the supposed finding.

To the extent that there is a factual finding by the Florida Supreme Court—a position the state has apparently abandoned in its brief before this Court—it is only that Colby's scruples would have "interfered" with her ability to judge guilt or innocence. The correctness of this "finding" is immaterial since it merely paraphrases the transcript of the voir dire and thus fails to address the relevant legal and factual question: whether the profundity of this "interference" was such as to prevent Colby from being impartial.

The federal district court's factual finding was infected with at least two separate legal errors and its ultimate conclusion based on a review of the voir dire transcript

was clearly erroneous. For all these reasons, the court of appeals was correct in conducting an independent review of the record to determine whether juror Colby's voir dire allowed her exclusion within the rules of *Witherspoon*.

Colby was improperly excluded. Under *Witherspoon* and *Adams* v. *Texas*, 448 U.S. 38 (1980), the controlling inquiry is whether the juror could have understood the prosecutor's use of the word "interfere" in his questions to mean something less than prevent. A reasonable juror could have understood it to mean "hinder," "make difficult," or "arouse uncomfortable emotions that affect to some extent." The juror was never asked the correct question: whether her scruples were so strong that she could not subordinate them to her duty as a juror and obey her oath and follow the court's instructions. Nothing she said even suggests an affirmative answer to that question. Since "neither nervousness [nor] emotional involvement . . . is equivalent to an unwillingness or an inability on the part of the jurors to follow the court's instructions and obey their oaths," juror Colby was improperly excluded under *Witherspoon*. *Adams*, 448 U.S. at 50.

In order to uphold this death sentence, the state asks the Court to overturn sixteen years of precedent and reverse the *Witherspoon* inquiry. It would require that the scrupled juror affirmatively assure the trial court of his or her impartiality. This issue was never raised in the federal district court or the court of appeals and should not be considered here for the first time. In any event, the Court has repeatedly rejected identical contentions, most recently in *Adams*. The state advances no compelling interest in the constriction of capital jury pools or other special needs that would justify such an exceptional departure from the principle of stare decisis.

Finally, the Court should affirm the judgment below because respondent's death sentence was affirmed by a state court that regularly collected and reviewed secret, ex parte materials concerning death-sentenced appellants before it. The state court denied relief on this issue because its consideration of these materials was not, in its view, unconstitutional; the lower federal courts denied relief because, in their view, the state court said it did not "use" the materials it collected. Thus, this documented and undeniable practice still stands, affronting even rudimentary notions of due process. It should be addressed and repudiated by this Court.

ARGUMENT

I. There Were No Relevant Factual Findings By The State Courts That Require A Presumption Of Correctness Under 28 U.S.C. § 2254(d), And, Therefore, The Court Of Appeals Was Correct In Making An Independent Review Of The Record

The state urges that *Witherspoon* issues be treated as pure questions of historical fact to be determined in light of state court findings accorded a presumption of correctness under 28 U.S.C. § 2254(d). However persuasive that proposition may be, it fails to provide a rule of decision in this case. Simply put, the issue is not presented. The court of appeals recognized this, noting that its decision would be the same even under the most deferential standard of review.[5] The court of appeals was correct because,

[5] As the Court of Appeals opinion noted in footnote 10, it would have reached the same result even under 28 U.S.C. § 2254(d) standards:

> The current uncertainty in our Circuit over the degree of deference under 28 U.S.C. § 2254(d) to be accorded to a trial court's finding of cause, *see Dorsey v. Wainwright*, 699 F.2d 1481 (11th Cir. 1983); *vacated on reh. en banc*, at 1043 (April 6, 1983); *Hance v. Zant*, 696 F.2d 940 (11th Cir. Jan. 24, 1983) is immaterial to our disposition of appellant's claim. We are convinced that the trial court erred in finding cause for excusal in this instance under even the least rigorous standard of appellate review.

J.A. 51-52.

as we show below, the merits of the constitutionally controlling factual dispute—whether "I think it would interfere" meant "I cannot be impartial"—were not determined by the state courts. Any findings of historical fact that *they* made or that might be implied from their rulings fail to resolve the *Witherspoon* issue in this case.

By its own terms the § 2254(d) presumption of correctness applies only to a state court "determination . . . on the merits of a factual issue . . . evidenced by a written finding, written opinion, or other reliable or adequate written indicia. . . ." 28 U.S.C. § 2254(d). Even then, the presumption does not apply when "the merits of the factual dispute were not resolved in the State court hearing." *Id.*, subsection (1). Thus, this Court has required deference to state court findings of historical fact only when the findings have been explicit[6] or when "it was clear" that the state court appropriately employed "the applicable federal" standard and the "failure to grant relief was tantamount to an express finding . . . of credibility. . . ." *Marshall v. Lonberger*, ___ U.S. ___, 74 L.Ed.2d 646, 658 (1983) (citing *La Valle v. Delle Rose*, 410 U.S. 690 (1973)). *See also Sims v. Georgia*, 385 U.S. 538, 539 (1967) (state trial judge's factual finding "that the confession is voluntary must appear from the record with unmistakable clarity").

Neither of these conditions is met in this case. There is no explicit factual finding. The trial court merely ruled on

[6] *See, e.g., Patton v. Yount*, ___ U.S. ___, 52 U.S.L.W. 4956, 4960 (June 28, 1984) (citing App. 98a); *Rushen v. Spain*, ___ U.S. ___, 79 L.Ed.2d 267, 272-274 (1983); *Maggio v. Fulford*, ___ U.S. ___, 76 L.Ed.2d 794, 797-99 (1983); *Smith v. Phillips*, 455 U.S. 209, 215-16 (1982); *Sumner v. Mata*, 449 U.S. 539, 542 (1981).

the prosecutor's motion to exclude juror Colby for cause, without any explanation of the basis for that ruling. J.A. 142. This is in sharp contrast to other cases where the Court has required deference to the state trial court's ruling on a motion to exclude a juror for cause. In *Patton* v. *Yount*, ___ U.S. ___, 52 U.S.L.W. 4996 (June 26, 1984), for example, the state trial judge explicitly credited that part of the voir dire where juror Hein "said he could go in with an open mind." *Id.* at 4998 (quoting App. 96a). Thus in *Patton*, unlike this case, there was an explicit credibility finding resolving the merits of the factual dispute with regard to partiality in addition to the legal ruling on the challenge for cause.

Nor is there an implicit finding in this case. This is not a situation where, unless an implicit finding of identifiable fact was made, "it was clear under the applicable federal law that the trial court would have" denied the motion to exclude. *Marshall* v. *Lonberger*, 74 L.Ed.2d at 656. Unlike the question of the voluntariness of a guilty plea considered in *Marshall* or of competency to stand trial considered in *Maggio* v. *Fulford*, ___ U.S. ___, 76 L.E.2d 794 (1983), the *Witherspoon* standard is not a single straightforward inquiry readily understood and routinely applied by the courts.[5] *See, e.g., Adams* v.

[5] The state asserts that the trial judge employed the correct legal standard in this case, State's Brief at 35-36, and supports the assertion by reference to the examination of other prospective jurors. J.A. 139-142. But the court's use of proper legal standards when questioning and excusing other prospective jurors does not show that the correct standard was used in questioning juror Colby. The questions asked of her by the prosecutor speak for themselves; the trial court so listened; but questioner may easily have missed the import of the substitution of "interfere" for "prevent."

Moreover, juror Colby was the first prospective juror questioned and excused because of her beliefs against capital punishment. S.R. 231, 237, 266-267. She never heard the questions asked of subsequent jurors. Consequently, it cannot be inferred that she understood the

Texas, 448 U.S. 38, 47-48 (1980) ("[I]t is clear beyond peradventure that Witherspoon is not a ground for challenging any prospective jurors. It is rather a limitation on the State's power to exclude. . . . While this point may seem too obvious to bear repetition, it is apparent from their frequent references to Witherspoon as a ground for 'disqualifying' prospective jurors that the State, and the Texas Court of Criminal Appeals, might have fallen into [this] error. . . ."). [6] Unlike *La Valle*, this is not a case where the state trial judge articulated the correct legal standard in making his ruling. *La Valle*, 410 U.S. at 695. Here, the trial judge articulated nothing at all.

Moreover, decisions of the Florida Supreme Court affirmatively suggest that a wrong standard was applied. *Witherspoon* held that death scrupled jurors could be excluded if they make "unmistakably clear" that "their attitude . . . would prevent them from . . . [being] impartial." *Id.*, 391 U.S. at 522 n.21. Yet the state's argument in this Court—that the burden be reversed and that it is their ability to be impartial which jurors must make unmistakably clear, State's Brief at 54-55, 57-58—has already prevailed in the Florida courts. In *Williams* v. *State*, 228 So.2d 377 (Fla. 1969), the Florida Supreme Court adopted the reasoning of *State* v. *Mathis*, 52 N.J. 238, 245 A.2d 20 (1968), and held that an equivocal juror may be excluded because "the State cannot determine his willingness to consider all penalties, nor can it determine

nature of the inquiry to her to be the same as that employed with other jurors.

[6] Indeed, the state urges that there is great inconsistency amongst the lower federal courts in the application of the *Witherspoon* standards. State's Brief at 23-25. While respondent does not agree with the state's characterization of the unsettled nature of *Witherspoon* jurisprudence, *see* Point IV *infra* at 28, the reported cases do illustrate the subtle, difficult, and nuanced nature of the *Witherspoon* determination.

whether or not the venirman's attitude toward the death penalty would prevent him from making an impartial decision as to guilt." *Id.* at 381. Despite the fact that *Mathis* was reversed, *Mathis* v. *New Jersey*, 403 U.S. 946 (1971), the Florida Supreme Court continues to adhere to the *Mathis* rule. *Brown* v. *State*, 381 So.2d 690, 694 (Fla. 1980). Thus, it cannot be presumed that the trial judge in this case applied the correct federal standard and not the settled but incorrect Florida standard allowing exclusion of a potential juror *because* of the unclear and equivocal nature of his or her scruples.[7]

Simply put, the state's § 2254(d) contention depends upon two unsupported premises: (1) that the judge ruled as a matter of law that Colby could be excluded only if her death-penalty attitude would prevent her from being impartial; and (2) that, therefore, he must have found as a fact that her interpretation of the ambiguous "interfere" was an unambiguous "prevent." But the judge stated neither of these premises; his unexplicated exclusion of Colby may as likely have rested upon his taking "interfere" at face value factually and holding it legally sufficient for exclusion under *Witherspoon*.

The nature of juror Colby's voir dire does not support either of these premises but rather tends to support the latter assumption. Even if one were to indulge the assumption that, based on demeanor, the trial judge made a determination that Colby's "I think" was unequivocal, it would yield only an unequivocal agreement with the prosecutor's proposition that her scruples would "interfere" with her ability to judge guilt or innocence. We still would not know what was meant by "interfere." It would be impossible to construct out of this record a trial court finding that "I think it would interfere" means

[7] In fact, the state relied on *Williams* and *Mathis* on direct appeal to the Florida Supreme Court. *See* discussion *infra* at 13.

"I cannot be impartial;" "interfere" was the prosecutor's word, not the juror's. Are we to infer that the trial judge made one demeanor determination regarding what the prosecutor meant and another that the juror understood the same thing?

This case stands in sharp contrast with the voir dire in *Patton* v. *Yount*. There the issue was the meaning of the juror's answers. In that case, "[d]emeanor plays a fundamental role . . . in simply understanding what a potential juror is saying." 52 U.S.L.W. at 4900 n.14. But when the issue is how a juror understood an ambiguous word in a question, demeanor does not provide an adequate key. *See id.* at 4900 ("It is well to remember that the lay persons on the panel may never have been subjected to . . . leading questions and cross-examination tactics. . . .").

The lack of any state trial court factual finding—whether based on demeanor or otherwise—is underlined by the fact that in the ten and one-half years since Witt's conviction the state never once saw the trial judge's "finding" and never once brought it to the attention of any other court, state or federal. When Witt raised the *Witherspoon* claim on direct appeal, the state argued that the exclusion was proper under "the applicable Florida law," Brief of Appellee at 9, and specifically relied on the *Williams* and *Mathis* cases. *Id.* at 11-12. The state did not identify any trial court finding based on demeanor and did not ask the Florida Supreme Court to affirm such a finding. On petition for a writ of certiorari after direct appeal, the state argued that "each" juror "made it unmistakably clear that their opposition to [the death penalty] was such that it would prevent them from making an impartial decision as to Petitioner's guilt or they would be unable to *consider* imposing a sentence of death" and that the "Florida Supreme Court so found." Brief in Opposition at 8-9.

In federal habeas, the state only relied on § 2254(d) to urge that deference should be given to the Florida Supreme Court's finding.[8] In its petition for certiorari, the state referred to "the unanimous judgment of seven Florida Supreme Court Justices," Cert. Petition at 12, and never once referred to any "finding" or demeanor determination made by the state trial judge. Even in its supplemental brief in support of certiorari, the state never once articulated that the state trial judge made a finding based on demeanor that is *now* to be presumed correct.[9] Only after Justice Rehnquist's opinion dissenting from the denial of certiorari in *Texas* v. *Mead*, ____ U.S. ____, 79 L.Ed.2d 714, 716 (1984), has the state revisited the bare record and discovered a factual finding based on demeanor.

The very notions of comity underlying § 2254(d) should counsel against relying on a purported state trial court factual finding that was never presented to the state appellate courts for review. *See Illinois* v. *Gates*, ____ U.S. ____, 76 L.Ed.2d 527,537 (1983) (declining to decide

[8] The state said in its Eleventh Circuit brief: "As in *Sumner*, the state appellate court sub judice gave plenary consideration to Witt's *Witherspoon* argument and concluded that the juror's statements warranted their exclusion. *Witt* v. *State*, 342 So.2d 497 at 499. As in *Sumner*, these findings were factual. . . ." There was no mention of the state trial court ruling whatsoever. Brief for Respondent-Appellee in the Court of Appeals at 27; *See also* Petition for Rehearing and Suggestion for Rehearing En Banc (J.A. 106, 107); District Court Evidentiary Hearing on April 23, 1981, at 79; the state's Evidentiary Hearing Memorandum in the District Court, District Court Record, document 52, at 21-22.

[9] Between the petition for certiorari and the supplemental brief the state did make a subtle change from the singular to the plural, arguing first that "the lower court erred by merely substituting its judgment for that of the state court," Cert. Petition at 9, and later that the Eleventh Circuit failed to defer to "the state courts' findings." Supp. Brief at 1.

question due to the "State's failure to raise a defense to a federal right or remedy asserted below"). The Court has ordinarily granted deference to a state's highest court both on questions of state law and on questions of fact properly determined and reviewed in the state courts. *See Enmund* v. *Florida*, 458 U.S. 782, 798 (1982) (Court looked to "[the record] as construed by the Florida Supreme Court" despite explicit and determinative factual finding by state trial judge). It would be anomalous to say that a prosecutor may decline to assert and defend a factual finding on direct review and thus preserve and insulate it from state appellate scrutiny, only to spring it on federal habeas corpus as a presumptively correct and, in effect, binding resolution of the facts.[10] For a federal court to allow the prosecutor to bypass the state courts in this manner would be to countenance a fundamental disrespect for the state courts relieving them both of their ability to supervise their own trial courts and their duty, concurrent with that of the federal courts, to expound and enforce the Constitution. *See Stone* v. *Powell*, 428 U.S. 465, 493 n.35 (1976) ("State courts, like federal courts, have a constitutional obligation to safeguard personal liberties and to uphold federal law."); *See also Moore* v. *Sims*, 442 U.S. 415, 430 (1979); *Huffman* v. *Pursue, Ltd.*, 420 U.S. 592, 609 (1975). To paraphrase Justice Reardon,[11] what could be a greater "humiliation" than to remove the power "of review" of state trial court factual findings "from the full bench of the highest State appel-

[10] As the Court noted last Term, "direct appeal is the primary avenue for review of a conviction or sentence, and death penalty cases are no exception." *Barefoot* v. *Estelle*, ____ U.S. ____, 77 L.Ed.2d 1090, 1100 (1983).

[11] *See Schneckloth* v. *Bustamonte*, 412 U.S. 218, 263-64 (1973) (Powell, J., concurring) (quoting Address of Justice Paul C. Reardon to the annual dinner of the Section of Judicial Administration, American Bar Association, San Francisco, California, Aug. 14, 1972, at 9).

late court" and instead give it "to a single United States District Court Judge" for review under § 2254(d)(8) to determine whether that factual finding is "fairly supported by the record?"[9]

Nor does § 2254(d) provide a rule of decision in this case, even if the Florida Supreme Court's "finding" on the *Witherspoon* issue is considered—an application of § 2254(d) that the state urged below and now apparently abandons. There is no relevant or helpful factual finding by the Florida Supreme Court. It merely upheld the exclusion of a juror who "could not judge the guilt or innocence of the accused without the possible imposition of the death penalty interfering with that determination." *Witt* v. *State*, 342 So.2d at 499. This is nothing more than a paraphrase of the record. It sheds no light on the merits of the factual dispute: whether in responding to the prosecutor's "would it interfere," Colby understood the question to mean "can you be impartial" or whether she understood it as "would it make it difficult for you; would it affect your determination; would it cause you emotional turmoil."

Thus, the court of appeals was correct in conducting an independent review of the voir dire in this case and reaching its own conclusion whether juror Colby made "unmistakably clear" that her scruples "would prevent" her "from making an impartial decision as to the defendant's guilt." *Witherspoon*, 391 U.S. at 522 n. 21 (emphasis deleted). Unaided by any state court findings, the court of appeals was correct in considering the equivocal nature of Ms. Colby's "I think" and "I am afraid." Moreover, it was correct in viewing the ambiguous nature of the prosecu-

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[9] As Justice Powell noted, "this Court has few more pressing responsibilities than to restore the mutual respect and the balanced sharing of responsibility between the state and federal courts. . . ." *Schneckloth*, 412 U.S. at 265.

tor's question as an impenetrable bar to understanding what the juror's responses meant.

> The testimony . . . of the challenged juror[] is ambiguous. . . . This is not unusual on *voir dire* examination. . . . It is well to remember that the lay persons on the panel may never have been subjected to the type of leading questions and cross-examination tactics that frequently are employed, and that were evident in this case. . . . Also, unlike witnesses, prospective jurors have had no briefing by lawyers prior to taking the stand.

Patton v. *Yount*, 52 U.S.L.W. at 4909. The record of Colby's voir dire provides only the ambiguous testimony that the prosecutor led her to give. The state should now shoulder the burden of its own constitutional shortcomings.

In sum, the court of appeals did not err by failing to give state court findings a presumption of correctness when there were no relevant findings. It properly reviewed the state court record and found that the potential juror's responses, together with the prosecutor's ambiguous questions failed to make unmistakably clear that the juror's scruples qualified her for exclusion within the narrow ambit allowed by *Witherspoon*.

II. The Court Of Appeals Was Correct In Performing An Independent Review Of The Record And, In Doing So, Acted In A Manner Consistent With The Requirements Of Rule 52(a)

The state argues that the court of appeals erred in conduction an independent review of the record and in failing to accord the federal district court's finding that Colby was properly excluded the deference due under F.R.C.P. 52(a). State's Brief at 41-42. The state is wrong and the court of appeals correct for two reasons. First, the district court ruling merely perpetuated the

misapplication of the *Witherspoon* standard in the state court. Second, the court of appeals was authorized and required to conduct an independent review of the record; having done so, it was correct in rejecting as clearly erroneous any factual findings indulged by the district court.

Rule 52(a) "does not inhibit an appellate court's power to correct errors of law . . . or a finding of fact that is predicated on a misunderstanding of the governing rule of law." *Bose Corp.* v. *Consumers Union of United States, Inc.*, ___ U.S. ___, 80 L.Ed.2d 502, 517 (1984); *accord Inwood Laboratories, Inc.* v. *Ives Laboratories, Inc.*, 456 U.S. 844, 855 n.15 (1982); *Pullman-Standard* v. *Swint*, 456 U.S. 273, 287 (1982). The district court ruling contained two such errors. It held that:

> Given that there exists no ironclad rule that the responses to questions on voir dire incorporating the phrases "I think" or "I am afraid" necessarily involve *Witherspoon* defects," and reading the responses of Colby in context, the Court concludes that her exclusion did not violate Petitioner's rights under the Sixth and Fourteenth Amendments. The state court's presumptively correct factual determination should accordingly stand. *Sumner*, *supra*.

J.A. 94. In its footnote 12, the district court cited the decision in *Brown* v. *State*, 381 So.2d at 694, where the Florida Supreme Court perpetuated its adoption of the *Mathis* rule. *Id.*

First, the district court's legal analysis was flawed because it considered only Colby's answers and not the prosecutor's defective questions. This is reflected in two separate aspects of the district court opinion: its exclusive focus on the significance of answers such as "I think" and "I am afraid" and its adoption of the Florida Supreme

Court's factual finding.[9] The district court never grappled with the problem that the questions asked of Colby were ambiguous and employed an improper legal standard; it only discussed the equivocal responses. This was the same legal error committed by the Florida Supreme Court, which held that it was proper to exclude a juror who said that her scruples would "interfere." Thus, the district court's finding of "fact" is premised on an unexamined but mistaken legal ruling, that "interference" is sufficient to disqualify a juror in accord with *Witherspoon*. *See* discussion *infra* Point III.

Second, the district court's reference to the opinion in *Brown* v. *State*, where the Florida court perpetuated the *Mathis* rule, suggests that the habeas court committed a second legal error—upholding an exclusion precisely *because* of the equivocal nature of the juror's scruples.

To the extent that the district court's finding of fact can be disentangled from its erroneous legal premises, it is nevertheless, clearly erroneous under Rule 52(a). The district court found that, "Colby's statements read in their entirety clearly indicate that her personal beliefs against the death penalty would have prevented her from making an impartial decision as to the petitioner's guilt or innocence . . ." J.A. 93-94. The court of appeals was correct in conducting an independent review of the record to determine whether this conclusion was "unmistakably clear" and in rejecting the district court's clearly erroneous finding.

The Court has repeatedly emphasized that, "When constitutional rights turn on the resolution of a factual dispute we are duty bound to make an independent exam-

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[9] It is clear from the record of the district court proceedings that it was the Florida Supreme Court's finding it was adopting because that was all the state asked it to adopt. *See* n.8 *supra* and accompanying text.

ination of the evidence in the record." *Coliseum* v. *Pennsylvania*, 418 U.S. 506, 517 n. 6 (1974) (quoting *Brookhart* v. *Janis*, 384 U.S. 1, 4 n. 4 (1966)); accord *Jackson* v. *Virginia*, 443 U.S. 307, 318 (1979) ("A federal court has a duty to assess the historic facts when it is called upon to apply a constitutional standard . . ."); *Mincey* v. *Arizona*, 437 U.S. 385, 398 (1978) ("this Court is under a duty to make an independent evaluation of the record"); *Drope* v. *Missouri*, 420 U.S. 162, 175 (1975) (quoting *Norris* v. *Alabama*, 294 U.S. 587, 590 (1935)); *see also Adams* v. *Texas*, 448 U.S. at 49 (*Witherspoon* determination made "[b]ased on our own examination of the record"). This duty of independent review is consonant with Rule 52(a):

> Rule 52(a) never forbids such an examination, and indeed our seminal decision on the rule expressly contemplated a review of the entire record, stating that a "finding is 'clearly erroneous' when although there is evidence to support it, the reviewing court *on the entire evidence* is left with the definite and firm conviction that a mistake has been committed."

Bose, 80 L.Ed.2d at 516 (quoting *United States* v. *United States Gypsum Co.*, 333 U.S. 364, 395 (1948)). Moreover, while "[t]he same 'clearly erroneous' standard applies to findings based on documentary evidence as to those based entirely on oral testimony, *see United States Gypsum Co.*, *supra*, 333 U.S. at 394, . . . the presumption has lesser force in the former situation than in the latter." *Bose*, 80 L.Ed.2d at 516.

In *Bose*, the Court applied the duty of independent review of the record to evaluate whether a district court finding of actual malice based on live testimony met the clear and convincing evidence standard required by the first amendment. Here, the question is whether the court of appeals properly reviewed the same cold voir dire

transcript before the district court to determine whether the juror's testimony met the "unmistakably clear" standard imposed by *Witherspoon*. In this context, where the institutional advantages of the district court are weaker and the evidentiary standard required by the Constitution no less exacting, it must a fortiori be true that: "Judges, as expositors of the Constitution, must independently decide whether the evidence in the record is sufficient to cross the constitutional threshold . . ." *Bose*, 80 L.Ed.2d at 523.

The court of appeals' independent review of the voir dire transcript correctly rejected the district court's clearly erroneous factual finding. Like the district court, the court of appeals "read [Colby's statements] in their entirety" and found that they do anything but "clearly indicate that her" scruples "would prevent her from making an impartial decision as to petitioner's guilt or innocence." J.A. 93-94. To the contrary, Colby first said that she could be impartial and follow the judge's instructions. R. 234, 258. She then indicated—with equivocal record responses such as "I think" and "I am afraid"—that her scruples would "interfere" with her sitting in judgment, without any indication what the extent of that interference would be. There is nothing in the record that clearly indicates that her scruples would prevent her from being impartial; the district court's conclusion to the contrary is clearly erroneous.

III. The Court Of Appeals Correctly Applied *Witherspoon And Adams* v. *Texas* To The Voir Dire In This Case

Decision in this case is controlled by *Adams* v. *Texas*, 448 U.S. 38 (1980), as the court of appeals recognized. The state first seeks to avoid this logic by an ad hominem attack that distorts the opinion below, ascribing to it a position that it expressly disavowed. On the merits, the

state indulges the very argument that the court of appeals properly held was foreclosed by *Adams*: an undiscriminating leap from "interfere" to "hinder" to "impair" to "prevent." State's Brief at 50-51.

The state assails a supposed "suggestion below that failure to conform strictly to the verbatim language of footnote 21 of *Witherspoon* may prove a fatal defect . . . ." State's Brief at 44, citing *Lockett* v. *Ohio*, 438 U.S. 586, 595-96 (1978). It then suggests a hypothetical where strict adherence to the *Witherspoon* "formula" would not be necessary to establish the propriety of the juror's exclusion. *Id.* at 47-48. Plainly speaking, these arguments are red herrings.

The implication that the court of appeals' decision is premised on a requirement that certain formulae be employed is disingenuous. The court below explicitly disavowed any *per se* rule regarding juror responses such as "I think" and made clear that "[t]he decision in this appeal . . . does not require that the veniremember utter a pat phrase . . ." J.A. 55-56. What the court of appeals did note was that the prosecutor asked the wrong question; he asked an ambiguous question that, from the perspective of the *Witherspoon* standard, is legally meaningless. J.A. 47-48. *See Darden* v. *Wainwright*, 725 F.2d 1526, 1531 (11th Cir. 1984) (en banc). In this, the court of appeals was correct. It would be requiring too much to expect a lay juror to employ any particular formula; the "complex and intricate legal questions" posed by *Witherspoon* are "obviously 'beyond the ken of a layman.'" *McNeal* v. *Culver*, 365 U.S. 109, 116 (1961) (quoting *Cook* v. *Culver*, 356 U.S. 633, 638 (1959)). But it is not too much to expect a prosecutor, trained in the law, to ask appropriate questions.[*]

[*] Nor, indeed, is it a problem. Most courts and prosecutors seem quite capable of asking proper *Witherspoon* questions. While *Witherspoon* claims are raised with some frequency, *Witherspoon* reversals are relatively rare. *See* discussion *infra* Point IV at 39 and Appendix A.

Of course, some formulations that fail to track the *Witherspoon* formula may nevertheless pass constitutional muster, such as those in *Lockett* or the juror's responses in the state's hypothetical. Yet this is not to say that all such deviations do. To borrow the state's language, "failure to conform strictly to the verbatim language of footnote 21 of *Witherspoon* may prove a fatal defect" (emphasis added), as it does in this case.

Comparison of the questions posed to the juror in *Lockett* with those posed to Colby illustrate why. In *Lockett*, the jurors were asked whether "they could not sit, listen to the evidence, listen to the law, [and] make their determination solely upon the evidence and the law" and whether they "feel that you could take an oath to well and truely [sic] try this case . . . and follow the law or is your conviction so strong that you cannot take an oath knowing that a possibility exists with regard to capital punishment?" *Id.*, 438 U.S. at 595-96. They said no and were properly excluded. But the questions put to Colby, in contrast, did not ask if she could follow the law as instructed, consider the evidence, or honor her oath. Perhaps capable of putting aside her scruples, she might well have answered "yes" to these questions. *See* R. 254, 258. Instead, she was asked only if her scruples would "interfere" with her ability to sit as a juror and judge guilt and innocence. They might well "interfere" but not be so strong or unyielding that she could not overcome that interference and "make [her] views subservient to [her] duty as a juror[]." *Witherspoon*, 391 U.S. at 516 n.9.

On the merits, the state's argument that "interfere" means "prevent" and that, therefore, Colby was properly excluded comes up short. "The critical question, of

course, is not how the phrases employed in this area have been construed by courts and commentators. What matters is how they might be understood—or misunderstood—by prospective jurors." *Witherspoon*, 391 U.S. at 516 n. 9; *see also Sandstrom* v. *Montana*, 442 U.S. 510, 514, 516-17 (1979) ("whether a defendant has been accorded his constitutional rights depends upon the way in which a reasonable *juror* could have interpreted the instructions"). On this, the court of appeals has the better of the argument. "The word 'interfere' admits of a great variety of interpretations . . .; it fails to reflect the profundity of any such 'interference.'" J.A. 47-48. To paraphrase the state's discussion of *Adams* v. *Texas*, *see* State's Brief at 49, "many things can [interfere with] a juror['s judgment]: the gruesome nature of photos; . . . the inconvenience of participating in a lengthy trial. Neither those nor the prospect of carefully deciding another man's fate merit removal from jury duty." Some jurors might indeed interpret "interfere" to mean "prevent," but other equally reasonable jurors could understand it to mean "make difficult," "create emotional turmoil," or "impair, but not substantially."

IV. The Court Has Clearly And Repeatedly Held That Jurors May Not Be Excused Solely Because Their Scruples Make It Difficult To Assure The Court Of Their Impartiality

The state's proposed new rule—that jurors may be excused if, because of their scruples, they are unable affirmatively to assure the court of their impartiality—asks the Court to overrule a substantial line of precedent

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* The state seeks to avoid this indisputable principle by the bald assertion that "an ordinary citizen understands the terms [interfere and prevent] to be synonymous. . . ." State's Brief at 16. Unless this means every reasonable citizen—an absurd proposition—it misses the point. The constitutional standard is what a reasonable juror *could* understand—or misunderstand.

that has been reaffirmed only recently. It would be particularly anomalous to do so in this case; the issue was never raised in the district court or the court of appeals and the Court, therefore, lacks the ordinary benefit of the analysis and consideration by the courts below. *Adickes* v. *Kress & Co.*, 398 U.S. 144, 147 n.2 (1970); *Cardinale* v. *Louisiana*, 394 U.S. 437, 438 (1969).

The state's proposed new rule is in direct conflict with *Witherspoon* itself; it would sanction the very practice *Witherspoon* sought to correct. The vice at Witherspoon's trial was the wholesale elimination of prospective jurors: "the prosecutor eliminated nearly half the venire of prospective jurors by challenging . . . any venireperson who expressed qualms about capital punishment." *Witherspoon*, 391 U.S. at 513. The "unmistakably clear" standard that *Witherspoon* announced was thus no accident. It was precisely and deliberately tailored to prevent the overbroad exclusion of potential jurors which resulted in a jury that "fell woefully short of the impartiality to which the petitioner was entitled under the Sixth and Fourteenth Amendments," *id.* at 518; "a jury composed exclusively of such [nonscrupled] people cannot speak for the community." *Id.* at 520.

In the years following *Witherspoon*, the Court repeatedly reaffirmed these principles, noting that a juror could not be excluded on "any broader basis." *Boulden* v. *Holman*, 394 U.S. 478, 482 (1969); *Maxwell* v. *Bishop*, 398 U.S. 262, 266 (1970). And in *Mathis* v. *New Jersey*, the Court reversed a decision of the New Jersey Supreme Court specifically based on the rule now urged by the state. *Id.*, 403 U.S. 946 (1971), *vacating State* v. *Mathis*, 52 N.J. 238, 245 A.2d 20 (1968).

The Court's recent opinion in *Adams* v. *Texas* speaks to the issue directly. The state argues that a "juror willing

to base his decision on extraneous factors such as emotions . . . is not impartial" and may be excluded "without seriously frustrating the legitimate purpose of *Witherspoon* and its progeny." State's Brief at 45, 55. But *Adams* rejects both the premise and conclusion of that argument. "Unlike grounds for exclusion having nothing to do with capital punishment, such as personal bias," the state's argument for exclusion of all jurors whose scruples make them unable to assure the judge of their impartiality "focuses the inquiry directly on the prospective juror's beliefs about the death penalty, and hence clearly falls within the scope of the Witherspoon doctrine." *Adams*, 448 U.S. at 48. And, under *Witherspoon*, their excusal is improper. *Adams* involved jurors who

> were excluded only because they were unable positively to state whether or not their deliberations would in any way be "affected." But neither nervousness, emotional involvement, *nor ability to deny or confirm any effect whatsoever* is equivalent to an unwillingness or an inability on the part of the jurors to follow the court's instructions and obey their oaths, regardless of their feelings about the death penalty.

448 U.S. at 50 (emphasis added; footnote ommitted.)[11]

The state's proposed new rule, moreover, would cut deeply into the core conceptions of the jury system.

> The purpose of a jury is to guard against the exercise of arbitrary power—to make available the commonsense judgment of the community as a hedge . . .

[11] Because, as acknowledged in *Adams*, some jurors will be unable to determine how their feelings about the death penalty will affect their determinations, the state's argument that it is proper to force the defendant to rehabilitate such potential jurors misses the mark. *See* State's Brief at 56-57. Despite "every incentive for the defendant to attempt to rehabilitate and show juror qualification," State's Brief at 57, some jurors will simply be unable to "deny or confirm any effect whatsoever." *Adams*, 448 U.S. at 50.

> prophylactic vechicle is not provided if the jury pool is made up of only special segments of the populace, or if large, distinctive groups are excluded from the pool . . . Restricting jury service to only special groups or excluding identifiable segments playing major roles in the community cannot be squared with the constitutional concept of a jury trial. "Trial by jury presupposes a jury drawn from a pool broadly representatives of the community as well as impartial in a specific case . . . [T]he broad representative character of the community should be maintained . . . partly as assurance of diffused impartiality . . ."

Taylor v. *Louisiana*, 419 U.S. 522, 530-31 (1975) (quoting *Thiel* v. *Southern Pacific Co.*, 328 U.S. 217, 227 (1946) (Frankfurter, J., dissenting)). *Adams* recognized that the *Witherspoon* juror is one of the matrix of the community from which a representative and impartial jury must be drawn. It noted that jurors' scruples "may affect what their honest judgment of the facts will be or what they may deem to be a reasonable doubt." 448 U.S. at 50. But, it noted:

> Such assessments and judgments by jurors are inherent in the jury system, and to exclude all jurors who would be in the slightest way affected by the prospect of the death penalty or by their views about such a penalty would be to deprive the defendant of the impartial jury to which he or she is entitled under the law.

Id.

The state fails to identify any substantial need that would justify such a radical departure from the Court's precedents. It suggests that its rule would "alleviate many of the dilemmas faced by trial judges" in selecting an impartial jury. *See* State's Brief at 55. But the burden is on the state to justify any substantial constriction of the jury pool, *Rose* v. *Mitchell*, 443 U.S. 545, 555-56 (1979);

Taylor, 419 U.S. at 534-35, and administrative convenience is an insufficient justification. "There must be weightier reasons . . ." *Taylor*, 419 U.S. at 534; *accord Duren* v. *Missouri*, 439 U.S. 357, 367-370 (1979). The state invokes its right to an impartial jury, but there has been no showing that the state's ability to obtain an impartial jury has been impaired by the settled *Witherspoon* rule in any way.[27] To the contrary, the death rows of this country bear ample witness to the fact that the states are having no difficulty in impaneling juries capable of rendering verdicts of guilt and imposing sentences of death. Similarly, the low *Witherspoon* reversal rate which stands at 7% in the last four years[28]—suggests that the principles established in that case are not hampering the states' ability to enforce their capital murder statutes.

The state has, in effect, invited the Court to overrule a substantial body of precedent including *Adams*, which was decided only four years ago. But "any departure from the doctrine of *stare decisis* demands special justification. . . . Petitioner has suggested no reason sufficient to warrant . . . taking the exceptional action of overruling" so much precedent. *Arizona* v. *Rumsey*, ____ U.S. ____, 52 U.S.L.W. 4665, 4667 (May 29, 1984).

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[27] If such a showing could be made at all, it would not be proper to offer it in this Court in the first instance, without the benefit of any consideration in the courts below or an evidentiary record developed in the district court. *Cardinale*, 394 U.S. at 439.

[28] This figure excludes the reversals in the wake of *Adams*. With the *Adams* reversals, the figure is 14.9%.

V. The Florida Supreme Court's Systematic Ex Parte Solicitation And Collection Of Psychiatric, Psychological And Correctional Reports Concerning The Respondent And Other Death-Sentenced Individuals During The Pendency Of Their Capital Appeals Violated The Right To Due Process, To The Effective Assistance Of Counsel, To Confrontation, To Be Free From Cruel And Unusual Punishment, And To Be Protected Against Self-Incrimination[29]

At the time of respondent's appeal of his conviction and death sentence, the Florida Supreme Court was engaged in the regular practice of soliciting and receiving extra-record psychiatric, psychological and other reports from state agencies concerning the mental condition and background of death-sentenced individuals. This practice was conducted in secret, without the sanction of any statutory authority or duly promulgated rule of procedure that would have notified respondent or his lawyers of its existence. Many of the reports[30] were later purged from the court's files, making verification of individual instances of the practice impossible.

Witt alleged these facts, which are documented by copies of numerous ex parte communications to and from the Florida Supreme Court.[31] In *Brown* v. *Wainwright*, 392 So.2d 1327 (Fla.), *cert. denied*, 454 U.S. 1000 (1981),

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[29] Respondent may present any ground in defense of the judgment below, so long as the ground would not expand the relief granted. *Smith* v. *Phillips*, 455 U.S. 209, 215 n.6 (1982); *United States* v. *New York Telephone Co.*, 434 U.S. 159, 166 n.8 (1977).

[30] The material solicited and received by the Florida court included, but was not limited to: presentence and postsentence investigation reports concerning the capital offense under review and other unrelated convictions; psychiatric evaluations or contact notes; psychological screening reports; probation or parole violation reports; and Florida prison classification and admissions summaries.

[31] Doc. No. 33 in the 11th Circuit appellate record.

the Florida court accepted the allegations as true, but found no legal merit in them. And, in a subsequent case, it held that even "consideration of such information by appellate judges . . . d[oes] not establish error. . . ." *McCrae* v. *Wainwright*, 422 So.2d 824, 827 (Fla. 1982). The court below rejected the claim on authority of the en banc opinion in *Ford* v. *Strickland*, 696 F.2d 804 (11th Cir.), *cert. denied*, ____ U.S. ____, 78 L.Ed.2d 176 (1983), which conceded that the challenged practice would be unconstitutional but denied relief because, in its view, the Florida court made a factual finding that it did not "use" or consider the material that it had assiduously solicited.

A fair reading of *Brown* refutes the conclusion in *Ford* that there was a factual determination regarding the use of these materials. *Brown* did not deny the allegations of receipt, consideration, and use of extra-record materials; it accepted those allegations as true and decided the case as on a demurrer. *Brown*, 392 So.2d at 1331, 1333 n.16. It repeated in *McCrae* that even its consideration of these materials was not error. *Id.*, 422 So.2d at 827. *Brown* did not deny the illegal practice; it made a *legal defense* of the court's constitutionally indefensible ex parte dealings. *See Brown*, 392 So.2d at 1333 n.17.*

Even in proceedings in which much less than life is at stake, due process forbids ex parte consideration of evidentiary materials. *See, e.g., Ohio Bell Telephone Co.* v. *Public Utilities Commission*, 301 U.S. 292, 300 (1937) (utility rate making). Due process has always required that materials be disclosed so that "the party against whom they are offered may see the evidence or hear it and parry its effects." 301 U.S. at 302. The ex parte materials

* Indeed in footnote 17, the *Brown* court attempted to justify its use of these materials, arguing that: "The 'tainted' information . . . was . . . in every case obtained to deal with newly articulated procedural standards." *Id.*

involved here include psychiatric and psychological reports, which particularly require testing by the adversary process. *Vitek* v. *Jones*, 445 U.S. 480, 495 (1980).

The prohibition against consideration of ex parte materials is especially important in capital cases. *Gardner* v. *Florida*, 430 U.S. 349 (1977). The "risk that some of the information accepted in [secrecy] may be erroneous, or may be misinterpreted [in the absence of adversary testing] . . . is manifest." 430 U.S. at 359. The violation here is more egregious than in *Gardner*. Gardner's counsel at least knew of the ex parte presentence report; the respondent here was never even informed that the Florida Supreme Court would consider any ex parte material. Yet it engaged in this practice at the very time it was reviewing Witt's appeal and determining issues of competency and relative culpability dependent on Witt's mental status. J.A. 133-34, 136.

In *Brown*, the Florida court held that the normal constraints of due process did not apply because it was only "reviewing" and not "imposing" death sentences. 392 So.2d at 1327, 1331. This, however, contradicts other statements of the Florida Supreme Court, which has stated that "this Court will exercise reasoned judgment as to what factual situations require the imposition of death," *Alvord* v. *State*, 322 So.2d 533, 540 (Fla. 1975), and that it has "a separate responsibility to determine independently whether the imposition of the ultimate penalty is warranted." *Songer* v. *State*, 322 So.2d 481, 484 (Fla. 1975), *vacated on other grounds*, 430 U.S. 902 (1977). *See Barclay* v. *Florida*, ____ U.S. ____, 77 L.Ed.2d 1134, 1139 (1983) (Stevens and Powell, JJ., concurring). The Florida Supreme Court frequently undertakes an independent weighing of the aggravating and mitigating circumstances to determine if a death sentence

should be approved.[9] It did so in Witt's case: "Our final and most difficult responsibility is to review the imposition of the death penalty and determine if it may properly be imposed in this case." J.A. 134. In such a proceeding, due process can only require that all materials considered undergo the scrutiny of the adversary process.

In addition to denying respondent due process, the receipt and review of ex parte materials violated the fifth amendment[10] and deprived the respondent of the effective assistance of counsel[11] and the right "to be confronted witnesses against him" as required by the sixth

[9] *See, e.g., State v. Dixon*, 283 So.2d 1 (Fla. 1973); *Herrera v. State*, 375 So.2d 389 (Fla. 1979). In the exercise of its "review" function, the Florida court has frequently found mitigating circumstances in the trial record that the trial judge did not find, and reversed death sentences in light of those findings. *See, e.g., Mines v. State*, 390 So.2d 332 (Fla. 1980); *Kampff v. State*, 371 So.2d 1007 (Fla. 1979).

[10] In *Smith v. Estelle*, 451 U.S. 454 (1981), the Court held that a defendant must be informed of his right to remain silent, to have questioning cease, and to consult with an attorney before being subjected to a psychiatric examination that may be used against him in the imposition of a death sentence. Like Smith, Witt was never told that information from interviews conducted by correctional employees or mental health professionals would be forwarded to the Supreme Court of Florida. Nor was he told of his right to refuse to participate in the interviews or his right to consult an attorney before the interviews.

[11] In *Gardner v. Florida*, the Court recognized the "importance of giving counsel an opportunity to comment on facts which may influence the sentencing decision in capital cases." 430 U.S. at 360. In addition, the oral and written presentations of trained counsel are necessary on appeal, as well as at trial, to argue about, explain, and test both the facts and the law of a case. *See, e.g., Anders v. California*, 386 U.S. 738 (1967).

amendment.[12] It also violated the eighth amendment: The "qualitative difference between death and other penalties calls for a greater degree of reliability when the death sentence is imposed." *Lockett v. Ohio*, 438 U.S. 586, 604 (1978). To be reliable, the decision to impose a death sentence must be based on information that has been subjected to the careful scrutiny of the adversary process. *Barefoot v. Estelle*, ___ U.S. ___, 77 L.Ed.2d 1090, 1109 (1983).

Each of the constitutional violations implicated by the Florida court's practice is at war with rudimentary notion of fairness. The judgment below vacating the death sentence should be affirmed.

[12] "The primary object of the [sixth amendment] was to prevent depositions or ex parte affidavits, such as were sometimes admitted in civil cases, being used against the prisoner in lieu of a personal examination and cross-examination of the witness. . . ." *Mattox v. United States*, 156 U.S. 237, 242 (1895).

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be affirmed.

Respectfully submitted,

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APPENDIX A*

*This Appendix lists every reported *Witherspoon* case for the years 1968 through 1992 in which the merits of the *Witherspoon* claim were reached. 'Rev' indicates that the death sentence was reversed because of an improper exclusion of a juror; 'aff' means that the *Witherspoon* claim did not lead to a reversal. Cases preceded by 'rem' are earlier rulings made in the same case, and are not included in the totals.

Alabama

Berard v. State	492 So.2d 1044 (Ala.Crim.App. 1986)	aff
Dobard v. State	435 So.2d 1351 (Ala. 1983)	aff
(See Ex Parte Dobard	435 So.2d 1359 (Ala.Crim.App. 1982)	aff)
Dunkins v. State	437 So.2d 1349 (Ala.Crim.App. 1983)	aff

Arkansas

Pickens v. Lockhart	542 F.Supp. 565 (E.D.Ark. 1982)	aff
Halsey v. State	386 S.W.2d 934 (Ark. 1965)	aff
Ruiz v. State	617 S.W.2d 6 (Ark. 1981)	aff
Miller v. State	621 S.W.2d 692 (Ark. 1981)	aff
(See Miller v. State	606 S.W.2d 430 (Ark. 1980)	aff)
Clines v. State	656 S.W.2d 694 (Ark. 1983)	aff

California

People v. Velasquez	606 P.2d 341 (Cal. 1980)(en banc)	rev
People v. Lanphear	608 P.2d 1689 (Cal. 1980)(en banc)	rev
People v. Harris	623 P.2d 240 (Cal. 1981)	aff
People v. Easley	654 P.2d 1272 (Cal. 1982)(en banc)	aff
People v. Fields	673 P.2d 680 (Cal. 1983)	aff

Delaware

Hooks v. State	416 A.2d 189 (Del. 1980)	aff

Florida

King v. Strickland	714 F.2d 1441 (11th Cir. 1983)	aff
(See King v. State	390 So.2d 315 (Fla. 1980)	aff)
Dobbert v. Strickland	718 F.2d 1518 (11th Cir. 1983)	aff
(See Dobbert v. State	409 So.2d 1050 (Fla. 1982)	aff)
Douglas v. Wainwright	521 F.Supp. 790 (M.D.Fla. 1981)	aff
Arango v. Wainwright	563 F.Supp. 1181 (S.D.Fla. 1983)	aff
(See Arango v. State	411 So.2d 172 (Fla. 1982)	aff)
Brown v. State	381 So.2d 690 (Fla. 1980)	aff
Downs v. State	386 So.2d 788 (Fla. 1980)	aff
Magill v. State	386 So.2d 1189 (Fla. 1980)	aff
Maggard v. State	399 So.2d 973 (Fla. 1981)	aff
Wilty v. State	402 So.2d 1159 (Fla. 1981)	aff
Smith v. State	407 So.2d 894 (Fla. 1981)	aff
Antone v. State	410 So.2d 157 (Fla. 1982)	aff
Stewart v. State	420 So.2d 862 (Fla. 1982)	aff
Johnson v. State	438 So.2d 774 (Fla. 1983)	aff
Engle v. State	438 So.2d 803 (Fla. 1983)	aff
Chandler v. State	442 So.2d 171 (Fla. 1983)	rev

Georgia

Smith v. Balkcom	660 F.2d 573 (5th Cir. 1981)	aff
Alderman v. Austin	696 F.2d 124 (11th Cir. 1983)(en banc)	rev
Hance v. Zant	696 F.2d 940 (11th Cir. 1983)	rev
Corn v. Zant	708 F.2d 549 (11th Cir. 1983)	aff
Spencer v. Zant	715 F.2d 1562 (11th Cir. 1983)(en banc)	aff
Brooks v. Francis	716 F.2d 789 (11th Cir. 1983)	aff
Davis v. Zant	721 F.2d 1478 (11th Cir. 1983)	aff
McCorquodale v. Balkcom	721 F.2d 1488 (11th Cir. 1983)	aff
Mason v. Balkcom	487 F.Supp. 554 (M.D.Ga. 1980)	aff
Mitchell v. Hopper	539 F.Supp. 77 (S.D.Ga. 1982)	aff
Potts v. Zant	575 F.Supp. 874 (N.D.Ga. 1983)	rev
Dampier v. State	265 S.E.2d 565 (Ga. 1980)	aff
Thomas v. State	266 S.E.2d 499 (Ga. 1980)	aff
Hance v. State	268 S.E.2d 339 (Ga. 1980)	aff
Wilson v. State	268 S.E.2d 896 (Ga. 1980)	aff
Lewis v. State	268 S.E.2d 915 (Ga. 1980)	rev
Green v. State	272 S.E.2d 475 (Ga. 1980)	aff
Dick v. State	273 S.E.2d 124 (Ga. 1980)	aff
Wallace v. State	273 S.E.2d 143 (Ga. 1980)	aff
Coulin v. State	273 S.E.2d 161 (Ga. 1980)	aff
Cofield v. State	274 S.E.2d 580 (Ga. 1981)	aff
Strickland v. State	275 S.E.2d 29 (Ga. 1981)	aff
Brown v. State	275 S.E.2d 52 (Ga. 1981)	aff
Blankenship v. State	277 S.E.2d 705 (Ga. 1981)	rev
Thomas v. State	282 S.E.2d 116 (Ga. 1981)	aff
Cervi v. State	282 S.E.2d 629 (Ga. 1981)	aff
Allen v. State	286 S.E.2d 3 (Ga. 1982)	rev
Krier v. State	287 S.E.2d 501 (Ga. 1982)	aff
Mathis v. State	291 S.E.2d 489 (Ga. 1982)	aff
High v. Zant	300 S.E.2d 654 (Ga. 1983)	aff
Castell v. State	301 S.E.2d 234 (Ga. 1983)	aff
Blankenship v. State	306 S.E.2d 369 (Ga. 1983)	aff
Godfrey v. Francis	308 S.E.2d 806 (Ga. 1983)	aff

Illinois

People v. Gaines	430 N.E.2d 1046 (Ill. 1981)	aff
People v. Newsome	443 N.E.2d 624 (Ill.App. 1982)	aff
People v. Tiller	447 N.E.2d 174 (Ill. 1982)	aff
People v. Szabo	447 N.E.2d 198 (Ill. 1983)	rev
People v. Free	447 N.E.2d 216 (Ill. 1983)	aff
People v. Kubat	447 N.E.2d 247 (Ill. 1983)	aff
People v. Williams	454 N.E.2d 220 (Ill. 1983)	aff

Indiana

Hoskins v. State	441 N.E.2d 419 (Ind. 1982)	aff
Johnson v. State	442 N.E.2d 1065 (Ind. 1982)	aff
Daniels v. State	450 N.E.2d 160 (Ind. 1983)	aff

Kentucky

Gall v. Commonwealth	607 S.W.2d 97 (Ky. 1980)	aff
Moore v. Commonwealth	634 S.W.2d 426 (Ky. 1982)	aff

Louisiana

Williams v. Maggio	679 F.2d 381 (5th Cir. 1982)	aff
Martin v. Maggio	711 F.2d 1273 (5th Cir. 1983)	aff
(See State v. Martin	370 So.2d 300 (La. 1979)	aff)
Sonnier v. Maggio	720 F.2d 401 (5th Cir. 1983)	aff
Prejean v. Blackburn	570 F.Supp. 965 (W.D.La. 1983)	aff
(See State v. Prejean	370 So.2d 240 (La. 1979)	aff)
State v. Monroe	397 So.2d 1258 (La. 1981)	aff
State v. Matthews	407 So.2d 1150 (La. 1981)	aff
State v. Brown	414 So.2d 689 (La. 1982)	aff
State v. Perry	420 So.2d 139 (La. 1982)	aff
State v. Jordan	420 So.2d 420 (La. 1982)	aff
State v. Narcisse	426 So.2d 118 (La. 1983)	aff
State v. James	431 So.2d 399 (La. 1983)	aff
State v. Moore	432 So.2d 209 (La. 1983)	aff
State v. Knighton	436 So.2d 1141 (La. 1983)	aff
State v. Kirkpatrick	443 So.2d 546 (La. 1983)	aff
State v. Celestine	443 So.2d 1091 (La. 1983)	aff

Mississippi

Bell v. Watkins	692 F.2d 999 (5th Cir. 1982)	aff
Irving v. Hargett	518 F.Supp. 1127 (N.D.Miss. 1981)	aff
Jones v. Thigpen	555 F.Supp. 870 (S.D.Miss. 1983)	aff
(See Jones v. State	381 So.2d 983 (Miss. 1980)	aff)
Edwards v. State	413 So.2d 1007 (Miss. 1982)	aff
Evans v. State	422 So.2d 737 (Miss. 1982)	aff
Hill v. State	432 So.2d 427 (Miss. 1983)	aff
Leatherwood v. State	435 So.2d 645 (Miss. 1983)	aff
Tokman v. State	435 So.2d 664 (Miss. 1983)	aff

Missouri

State v. Royal	610 S.W.2d 946 (Mo. 1981)(en banc)	aff
State v. Mercer	619 S.W.2d 1 (Mo. 1981)(en banc)	aff
State v. Newlon	627 S.W.2d 606 (Mo. 1982)(en banc)	aff

State v. Bobber	435 S.W.2d 673 (Mo. 1982)(en banc)	aff
State v. Stokes	639 S.W.2d 715 (Mo. 1982)(en banc)	aff
State v. Blair	639 S.W.2d 739 (Mo. 1982)(en banc)	aff
State v. Walker	639 S.W.2d 854 (Mo.Ct.App. 1982)	aff
State v. Battle	661 S.W.2d 497 (Mo. 1983)(en banc)	aff
State v. Laws	661 S.W.2d 529 (Mo. 1983)(en banc)	aff
State v. Woods	662 S.W.2d 936 (Mo.Ct.App. 1983)	aff
Nebraska		
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North Carolina		
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Oklahoma		
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Kapiel v. State	668 P.2d 1357 (Okla.Crim.App. 1983)	aff
Stafford v. State	668 P.2d 295 (Okla.Crim.App. 1983)	aff
Coleman v. State	670 P.2d 106 (Okla.Crim.App. 1983)	aff
White v. State	674 P.2d 51 (Okla.Crim.App. 1983)	aff
South Carolina		
State v. Gaskby	260 S.E.2d 51 (S.C. 1980)	aff
State v. Copeland	280 S.E.2d 60 (S.C. 1982)	aff
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Tennessee		
Houston v. State	280 S.W.2d 267 (Tenn. 1980)	aff
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State v. Pritchett	621 S.W.2d 127 (Tenn. 1981)	aff
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Texas		
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Brooks v. Estelle	697 F.2d 106 (5th Cir. 1982)	aff
Porter v. Estelle	709 F.2d 944 (5th Cir. 1983)	aff
(See Porter v. State	623 S.W.2d 374 (Tex.Crim.App. 1981)(en banc)	aff)
O'Bryan v. Estelle	714 F.2d 380 (5th Cir. 1983)	aff
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Esquivel v. State	595 S.W.2d 516 (Tex.Crim.App. 1980)(en banc)	aff
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Sanne v. State	609 S.W.2d 762 (Tex.Crim.App. 1980)(en banc)	aff
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Fearance v. State	420 S.W.2d 577 (Tex.Crim.App. 1968)(en banc)	rev*
Ex Parte Chambers	420 S.W.2d 572 (Tex.Crim.App. 1968)(en banc)	aff
Darrough v. State	420 S.W.2d 134 (Tex.Crim.App. 1967)(en banc)	rev*
Bass v. State	422 S.W.2d 181 (Tex.Crim.App. 1967)(en banc)	aff
Williams v. State	422 S.W.2d 116 (Tex.Crim.App. 1967)(en banc)	aff
White v. State	429 S.W.2d 761 (Tex.Crim.App. 1968)(en banc)	aff
Vanderbilt v. State	429 S.W.2d 769 (Tex.Crim.App. 1968)(en banc)	aff
Turner v. State	433 S.W.2d 734 (Tex.Crim.App. 1968)(en banc)	rev*
Lackey v. State	439 S.W.2d 639 (Tex.Crim.App. 1969)(en banc)	rev*
Cuevas v. State	441 S.W.2d 859 (Tex.Crim.App. 1969)(en banc)	rev*
O'Fry v. State	442 S.W.2d 749 (Tex.Crim.App. 1969)(en banc)	rev*
Bardo v. State	443 S.W.2d 329 (Tex.Crim.App. 1969)(en banc)	aff
Hernandez v. State	443 S.W.2d 897 (Tex.Crim.App. 1969)(en banc)	aff
Rougeau v. State	451 S.W.2d 739 (Tex.Crim.App. 1969)(en banc)	rev*
Rossi v. State	443 S.W.2d 279 (Tex.Crim.App. 1969)(en banc)	rev*
Bullington v. State	452 S.W.2d 894 (Tex.Crim.App. 1969)(en banc)	rev*
Evans v. State	456 S.W.2d 65 (Tex.Crim.App. 1969)(en banc)	aff
Portillo v. State	456 S.W.2d 79 (Tex.Crim.App. 1969)(en banc)	rev
Hawkins v. State	460 S.W.2d 63 (Tex.Crim.App. 1969)(en banc)	aff
Jernigan v. State	461 S.W.2d 988 (Tex.Crim.App. 1969)(en banc)	aff

Virginia

Turner v. Commonwealth	273 S.E.2d 30 (Va. 1969)	aff
LeVasseur v. Commonwealth	304 S.E.2d 644 (Va. 1969)	aff

Wyoming

Hopkinson v. State	432 P.2d 79 (Wyo. 1967)	aff

Totals: 28 reversals in 177 cases (14.9%); 10 reversals excluding Texas cases (7%)

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*Indicates Texas cases reversed in the wake of *Adams v. Texas*, 448 U.S. 38 (1980).

REPLY

BRIEF

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1983

CASE NO. 83-1427

LOUIE L. WAINWRIGHT, Secretary
Department of Corrections
State of Florida

Petitioner,

vs.

JOHNNY PAUL WITT,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

REPLY BRIEF OF PETITIONER

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ARGUMENT

Respondent contends that the statutory presumption of correctness of 28 U.S.C. §2254(d) is inapplicable in the instant case because the state courts allegedly made no relevant findings that Florida Supreme Court decisions suggest that a wrong standard is applied and that the state has impermissibly changed its argument from that presented below. Before addressing these arguments, a few comments are appropriate regarding this Court's recent decision, Patton v. Yount, ___ U,S. ___, 81 L.Ed.2d 847 (1984), which in Petitioner's view compels reversal.

In Patton, a habeas petitioner claimed that pretrial pulicity so infected the community that at his retrial he was denied the constitutional right to an impartial jury. The trial judge concluded that

the jury was without bias, a federal magistrate concluded otherwise, the district court rejected the magistrate's recommendation, and the Third Circuit Court of Appeals, relying on Irvin v. Dowd, 366 U.S. 717 (1961) reversed the district court.

This Court reversed the Court of Appeals. Writing for six members of the Court, Justice Powell explained that the federal appellate court failed to consider the requirement of Irvin that the trial court findings of impartiality might be overturned only for "manifest error" and suggested in footnote 7 that the subsequent development of the law of habeas corpus might even have required a different analysis or result as that reached in Irvin. The Court then limited Irvin:

"It was the view of all three Court of Appeals judges that the question whether jurors have opinions that disqualify them is a mixed question of law and fact. See 710 F.2d 968, n.20, 981. Thus, they concluded that the presumption of correctness due a state court's factual findings under 28 USCS §2254(d) does not apply. The opinions below relied for this proposition on Irvin v. Dowd, supra at 723, 6 L.Ed.2d 751, 81 S.Ct. 1639. Irvin addressed the partiality of the trial jury as a whole, a question we discuss in Part II, supra. We do not think the analysis can be extended to a federal habeas corpus case in which the partiality of the individual juror is placed in issue. That question is not one of mixed law and fact. Rather, it is plainly one of historical fact, did a juror swear that he could set aside any opinion he might hold and decide the case on the evidence and should the juror's protestation of impartiality have been believed. Cf. Rushen v. Spain, ___ US ___, ___, 78 L. Ed.2d 267, 104 S.Ct. 453 (1983) (state court determined that juror's deliberations were not biased by ex parte communications is a finding of fact)."
(81 L.Ed.2d at 857)

The statutory presumption of correctness was deemed appropriate because:

> "First, the determination has been made only after an often extended voir dire proceeding designed specifically to identify biased veniremen. . . Second, the determination is essentially one of credibility, and therefore largely one of demeanor. . ."
> (81 L.Ed.2d at 850)

As explained in footnote 14:

> "Demeanor plays a fundamental role not only in determining juror credibility, but also in simply understanding what a potential juror is saying. Any complicated voir dire calls upon lay jurors to think and express themselves in unfamiliar terms, as a reading of any transcript of such a proceeding will reveal. Demeanor, inflection, the flow of the questions and answers can make confused and conflicting utterances comprehensible."

Acknowledging that jurors cannot be expected invariably to express themselves carefully or consistently, the Court decided that:

> ". . . under our system it is that [trial] judge who is best situated to determine competency to serve impartially."
> (81 L.Ed.2d at 859)

Even where a juror appeared simply to have answered "yes" to almost any question asked:

> "It is here that the federal court's deference must operate, for while the cold record arouses some concern, only the trial judge could tell which of those answers was said with the greatest comprehension and certainty."
> (81 L.Ed.2d at 859)

The reasoning of Patton is fully applicable to the instant case. A voir dire examination of jurors under oath is conducted for the purpose of determing their qualifications to serve in light of their capital punishment views. The determination of their credibility and of what they are saying is best made by the

trial judge who can observe their demeanor and physical gestures and hear the tone of their utterances. It would be irrational to hold that the trial judge is uniquely able to determine whether a juror may be able to serve despite pretrial publicity, but not be able to decide that a juror has expressed an inability to decide because of her expressed beliefs regarding capital punishment.1/

Respondent argues that in the instant case, the state courts made no relevant factual findings. Witt contends that Patton is distinguishable in that the trial

1/ Moreover, unlike the instant case, Patton involved the possible selection of jurors who may have harbored personal animus against the accused as a result of pretrial prejudicial publicity. If that trial judge erred in his assessment, a biased juror might remain. If the trial judge erred sub judice, no anti-Witt juror decides his fate, rather another qualified impartial juror replaces the excused juror.

judge there articulated specifically the credibility determination regarding juror Hrin's comment that he could have an open mind. In the case sub judice, the trial judge granted the prosecutor's motion to exclude Ms. Colby for cause after her response to the Witherspoon inquiries; the defense neither objected nor requested additional qualifying inquiry as permitted by state law.2/ Since the meanings of Colby's responses were clear to all present in the courtroom, it became unnecessary for Judge Ryder to more specifically articulate the basis of his ruling. Judge Ryder's implicit factual finding that Colby expressed her inability to impartially decide Witt's guilt or innocence is not substantially different from

2/ Paramore v. State, 229 So.2d 855 (Fla. 1969).

the trial judge's actions in LaVallee v. Della Rose, 410 U.S. 690 (1973), where although the trial court did not specifically articulate its credibility findings, it was clear that the defendant's contentions were resolved against him.

Additionally, the Florida Supreme Court confirmed the trial judge's findings in its written opinionk on Witt's direct appeal (JA 128). Respondent contends that Florida Supreme Court decisions suggest that a wrong standard is employed. He cites Williams v. State, 228 so.2d 377 (Fla. 1969), vacated on other grounds 408 U.S. 941 (1972) and Brown v. State, 381 So.2d 690 (Fla. 1980), cert. den. 447 U.S. 148 (1981).3/

3/ The federal appellate court agreed with the Florida Supreme Court's Witherspoon ruling in Williams. See Williams v. Wainwright, 437 F.2d 921 (5 Cir. 1970). Brown's claim on certiorari presumably was not substantial enough to merit review.

An examination of that Florida Supreme Court's ruling in Respondent's case reveals that it did correctly understand and apply the proper standard:

> It is proper to exclude prospective jurors who "state that their reservations about capital punishment would prevent them from making an impartial decision as to the defendant's guilt.
>
> . . .[or] who say that they would never vote to impose the death penalty or that they would refuse even to consider its imposition in the case before them." Witherspoon v. Illinois, 391 U.S. 510, 513-14, 88 S.Ct. 1770, 1772, 20 L.Ed.2d 776 (1968) (footnote omitted). The statements of the jurors in the instant case constitutionally warranted their exclusion.
> (JA 128-129)

The Florida Supreme Court did not allude to State of New Jersey v. Mathis, 52 N.J. 238, 245 A 2nd 20 (N.J. 1966), vacated Mathis v. New Jersey, 403 U.S. 946 (1971) in Witt's direct appeal. As

explained in Point IV infra, the basis of the court's ruling in Mathis is unclear. If Mathis means that the state may not insist that jurors consider and decide the facts impartially and apply the law as instructed by the judge, then Mathis is inconsistent with Adams v. Texas, 440 U.S. 38, 45 (1980).

Respondent finally argues that Petitioner impermissibly has shifted his position from that presented below. His plea rings hollow. In the district court Witt complained of the responses given by the prospective juror, he did not urge error in the questions propounded until he reached the federal appellate court (see R 32, pp. 4-5 of Witt's Amended Habeas Petition, R 53, pp 34-39 of Witt's Evidentiuary Hearing brief). Petitioner did urge below that the lower court was

ignoring the factual findings of the state court (JA 103, JA 109; see also Certiorari Petition at 16). The lower court's position was and remains that 28 U.S.C. §2254(d) is inapplicable to Witherspoon matters. See also Darden v. Wainwright, 735 F.2d 1526, 1530, n.2. (11 Cir. 1984) cert. pending, Case no. 83-1613.

The decision of the lower court is inconsistent with Patton v. Yount, supra, wherein this Court has chosen to place the primary responsibility in the trial judge to evaluate the responses of prospective jurors concerning their ability to fairly decide the guilt or innocence of the accused. The lower court ruling must be overturned.

II

ARGUMENT

Respondend contends that the lower court correctly declined to accept the district court's finding because that court merely perpetuated the misapplication of the Witherspoon standard in the state court. As already stated, the Florida Supreme Court did not articulate an erroneous interpretation of Witherspoon (JA 128-129).

Witt mentions that District Judge Carr misapplied the law because he alluded to Brown v. State, 381 So.2d 690 (Fla. 1980) in footnote 12 of his order (JA 94). The context of the response shows that Judge Carr was offering support for the judgment that a juror's prefatory employment of "I think" phraseology was not a fatal defect, a ruling which the lower court apparently accepted (JA 55). It is

difficult to see how Respondent can criticize the district court on this when now Witt concedes that it would require too much to expect a lay juror to employ any particular formula (Brief, p. 22). Respondent further contends that the district court erred in considering only the juror's answers and not the prosecutor's questions. Perhaps the district court focused on the answers because that is how Respondent Witt presented his claim (R 32, pp 4-5, R 53, pp. 34-39). In addition, the district judge did consider the questions propounded (JA 93). While Witt may disagree with the conclusion arrived at by Judge Carr, it is unfair and inaccurate to say that the court did not grapple with the problem.

Respondent argues that the district court finding was, in any event, clearly

erroneous. While it may be true that less force should be attributed to a district judge's finding based on documentary evidence than when based on oral testimony, surely Rule 52(a) contemplates that a district court's findings will not be overturned simply beause the appellate court might have decided differently had it been the factfinder. Cf. Wainwright v. Goode, ___ U.S. ___, 78 L.Ed.2d 187 (1983) (in applying 28 U.S.C. §2254(d), the federal appellate court may not substitute its view of the facts for that of the state court where both conclusions find fair support in the record). Since the lower court did not take into account the role of the trial judge in observing and hearing the juror's responses, and did not weigh the fact that the clarity and conviction of the responses was confirmed by defense counsel's willingness to permit

excusal without objection or complaint, its substituted judgment was unwarranted.

Witt contends that juror Colby said she could be impartial and follow the judge's instructions, citing R 234 and R 258. The record shows no response given by the jury panel at R 234. At R 258, an affirmative answer was only given to the question whether the jurors could accept the court's instruction regarding the length of time for premeditation.

The lower court erred in rejecting Judge Carr's finding that Colby's attitude toward the death penalty would prevent her from making an impartial decision as to Witt's guilt (JA 92).

III

ARGUMENT

Respondent contends that Petitioner errs in the judgment that the lower court too strictly relied on the terminology of footnote 21 of Witherspoon. Witt points to language in the lower court ruling disavowing the premise that a venireperson must utter a pat phrase (JA 55). However, the lower court has continued to insist that the questions propounded be identical to footnote 21 of Witherspoon (JA 47). See Darden v. Wainwright, 725 F.2d 1526, 1532:

> "only a procedure that employs precise questions - questions that clearly pose the twofold Witherspoon inquiry set out in footnote 21 of the Supreme Court's opinion - and that elicits unmistakably clear answers from each venireperson can satisfy the Court's strict standard." (emphasis supplied)

Petitioner continues to insist that adherence to an exact formula in the question or answer is unnecessary.

In Lockett v. Ohio, 438 U.S. 536 (1978), this Court upheld the excusal of jurors who provided affirmative answers to the question:

> "[D]o you feel that you could take an oath to well and truely [sic] try this case . . . and follow the law, or is your conviction so strong that you cannot take an oath, knowing that a possibility exists in regard to capital punishment?"
> (438 U.S. at 595-596)

In Darden v. Wainwright, 725 F.2d 1526 at 1530-1531 (11 Cir. 1984), the lower court found the following colloquy defective:

> "THE COURT: Do you have any moral or religious, conscientious moral or religious principles in opposition to the death penalty so strong that you would be unable without violating your own principles to vote

to recommend a death penalty regardless of the facts?

MR. MURPHY: Yes, I have.

The lower court deemed that the Witherspoon inquiry was inadequate because not in conformity to the language of footnote 21. Petitioner submits that the questions and answers provided in Lockett and Darden were substantially the same and merited the same result in excusal of the juror.

Respondent further argues that a reasonable juror may have understood the word "interfere" to mean "prevent" but that a reasonable juror may also have understood it to have other meanings. The instant record does not exhibit juror Colby being confused about the question or needing clarification from anyone; trial defense counsel was not confused by the

question nor did he seek further explanation. 4/ Respondent's discovery in the federal appellate court that the use of the word interfere created an ambiguity he hadn't previously discerned is unacceptable. Consistent with the ruling in Patton, supra, this Court should reiterate that it is for the trial judge to evaluate the strength of the juror's expression regarding the ability to fairly decide the accused's case.

4/ In fact, defense counsel used the word Interfere when conducting the voir dire examination of juror Gordon (JA 151).

IV

ARGUMENT

Respondent contends that adoption of Petitioner's suggestion that excusal is appropriate for jurors who will not assure the trial court that they can follow the law and impartially decide the guilt or innocence of the accused would be a radical departure from this Court's precedents. Petitioner disagrees. Petitioner submits that the rule offered would provide needed guidance to the lower courts. It would end the present confusion whereby some courts, despite Lockett v. Ohio, require strict conformity to footnote 21 terminology to validate excusals for cause; it would reinforce the Court's repeated acknowledgment in Adams v. Texas that the state has a right to insist that jurors will consider and decide the facts impartially and

conscientiously apply the law as charged, 448 U.S. at 45, and it would in acordance with this Court's recent precedents from Wainwright v. Sykes, 433 U.S. 71 to Patton v. Yount, supra, promote the concept that the trial is the main event and the trial judge occupies a primary and unique role in the criminal justice system.

Respondent argues that Petitioner's proposed rule would conflict with Witherspoon; it would not. Witherspoon requires that jurors not be excused simply because they voiced general objection to the death penalty or expressed conscientious or religious scruples against its infliction. 391 U. S. at 572. Petitioner asks no retreat from that holding. But for those jurors who refuse or are unable to assure the trial judge that they can impartially decide the guilt of innocence of the

accused, they are subject to excusal for cause.

No radical departure from the Court's precedents is envisioned. In Adams v. Texas, the excusal of jurors involved a defective procedure because there the state insisted upon an oath that a juror not be affected in the determination of any factual issue by the juror's capital views: thus, it was almost required that a juror not take his deliberations seriously. Presumably, under the Texas statute, a prospective juror could not even be rehabilitated by additional questioning. If the juror would be affected in deliberating on any factual issue the state law would require his removal even if he could follow the law as instructed by the court. Wainwright does not ask that jurors not be affected by capital punishment, but

it is consistent with Adams to require that they assure the trial court they can impartially decide the case.

Respondent cites Maxwell v. Bishop 398 U.A. 262 (1970; Boulden v. Holmes, 394 U.S. 478 (1969) and Mathis v. New Jersey, 403 U.S. 946 (1971), decisions following in the wake of Witherspoon. All these cases involved trials occurring prior to Witherspoon and the state trial judges had not had the opportunity to apply that new decision. 3/ In Mathis, it is impossible to determine the basis of the Court's

3/ Maxwell was convicted of rape in 1962, 398 U.S. 262, 265. Boulden's murder conviction was upheld by the state appellate court in 1965. Boulder v. State, 179 So.2d 10 (Ala. 1965). The New Jersey Supreme Court decided Mathis one month after the Witherspoon ruling. State v. Mathis, 245 A.2d 20 (N.J. 1980). In both Maxwell and Boulder, this Court remanded to the lower court for final resolution of the Witherspoon issue. 398 U.S. at 266; 294 U.S. at 484.

ruling; it is unclear whether the Court disagreed with the state court statement that a juror should be required to assure that he will judge (as respondent suggests) or whether the Court felt that jurors' use of such words as "I think" was defective 6/ (or whether other jurors not reported in the state court opinion were improperly excluded) or whether the court found unaceptable the state court opinion that the erroneous exclusion of a single juror did not necessarily call for reversal.7/ State v. Mathis, 235 A.2d 20, 26-27 (N.J. 1968).

6 Both the lower court and Respondent concede that employment of "I think" in a response is not per se fatal (JA 55, Brief P. 22).

7/ This part of the analysis has not survived Davis v. Georgia, 429 U.S. 122 (1976).

Whatever may have been the basis for the Mathis ruling, much has transpired since then including the development of the law whereby habeas courts may be precluded from considering federal claims ruling; it is unclear whether the court disagrees with the state court statement noncompliance with a valid state procedural rule requiring contemporaneous objection (Wainwright v. Sykes) and the enforcement of the statutory requirement in 28 U.S.C. §2254(d) to accord deference to state court findings of fact culminating in Patton v. Yount. Far from asking the Court to overrule substantial precedent, Petitioner asks the Court to apply its recent precedents.

Respondent mentions that the state is not inhibited in obtaining impartial jurors. When the state is precluded from

excluding for cause prospective jurors who will not decide the accused's guilt or innocence and when state courts are left to speculate as to what formulae questions and answers will be accepted as adequate by the lower federal courts, Petitioner submits that the state is unnecessarily inhibited in the ability to obtain impartial jurors. 8/

8/Undoubtedly, if a juror partial to the defendant is not excused, the result may be an acquittal or a verdict on a lesser degree and such conclusions do not appear in the reported appellate decisions.

CONCLUSION

Based on the foregoing reasons, arguments and authorities, the decision of the lower court should be reversed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing has been furnished by U. S. Mail to William C. McLain, Assistant Public Defender, 455 North Broadway Avenue, Bartow, Florida 33830 on this _____day of September, 1984.

Of Counsel for Petitioner